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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. **384**

PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, THE NEW YORK TIMES COMPANY),

Petitioner,

v.

NEW YORK MAILERS' UNION NUMBER SIX,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, THE NEW YORK TIMES COMPANY),

Petitioner,

v.

NEW YORK MAILERS' UNION NUMBER SIX,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Publishers' Association of New York City (on behalf of its member, The New York Times Company), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit insofar as it reverses that part of an order of the District Court for the Southern District of New York staying certain action by respondent Union pending arbitration ordered by the District Court.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 317 F. 2d 624, and is printed in Appendix B hereto, *infra*, p. 11.

The opinion of the District Court, not officially reported, is reported at 52 LRRM 2101, and is printed in Appendix B hereto, *infra*, p. 19.

Jurisdiction

The opinion of the Court of Appeals was dated and issued on May 20, 1963, and judgment was entered thereon on June 6, 1963. No order respecting a rehearing, and no application for an extension of time within which to petition for certiorari were made.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Question Presented

Whether that part of an order enforcing a status quo provision pending arbitration, ordered by the Court pursuant to a collective bargaining agreement, is prohibited by the Norris-LaGuardia Act where the action stayed by such part of the order is not any one of the kinds of conduct specified in Section 4 of that Act (29 U. S. C. §104).

Statute Involved

The pertinent statutory provisions are Sections 4 and 7 of the Norris-LaGuardia Act, 29 U. S. C. §§104, 107. They are printed in Appendix A, *infra*, pp. 7-10.

Statement of the Case

Petitioner and respondent are parties to a collective bargaining agreement that contains, *inter alia*, a broad arbitration clause (§33-b)*, a status quo provision main-

* The cited provisions of the collective bargaining agreement are printed in the Appendix C hereto, pp. 21-22.

taining existing conditions pending decision by arbitration (¶34) and a prohibition against Union discipline of the foreman (¶20-c), who must be a member of the Union (¶4). The New York Times mailroom foreman, Everett Rowan, was notified that the Union had taken cognizance of charges filed against him by a member of the Union who worked under him. The Times took the position that the Union had no right under the contract to proceed with charges against its foreman and instructed the Association to file a grievance on its behalf, protesting the Union's contemplated action and demanding maintenance of the status quo. The Union disputed the Association's position—labelling the protest made on behalf of the Times as "officious intermeddling" in internal Union affairs—and rejected the Association's protest, request for arbitration and demand for maintenance of the status quo.

Faced with this refusal to arbitrate and to honor the status quo provision, the Association brought an action, pursuant to Section 301 of the Labor Management Relations Act (29 U. S. C. §185) and under the United States Arbitration Act (9 U. S. C. §1, *et seq.*), to compel the Union to arbitrate the dispute. To preserve the status quo pending the arbitration in accordance with the provisions of the contract, and to prevent frustration of its contention that the foreman must not be subjected to Union disciplinary proceedings before that contention could be considered in arbitration, the Association sought and obtained from the District Court a stay of Union proceedings against the foreman until the arbitration could be heard and decided.

The Court of Appeals concluded that the order directing arbitration was proper, but rendered that relief meaningless by holding that Norris-LaGuardia precluded that part of the order preserving the status quo.

Reasons for Granting the Writ

1. The decision below involves an important question of federal law which has not been, but should be, settled by this Court. It would extend the application of Norris-LaGuardia to a situation beyond its adjudicated scope and substantially weaken the policy favoring arbitration of disputes arising under collective bargaining agreements. If the decision stands, then the District Courts—even while properly directing that disputed matters be referred to arbitration—will be powerless, as a matter of ancillary relief, to stay contemporaneous conduct inconsistent with the submission to arbitration, even where such conduct is clearly outside Section 4 of the Norris-LaGuardia Act. The consequence is to permit unilateral action by any party to a collective agreement to vitiate the salutory function of the arbitration process.

2. This unfortunate result necessarily conflicts with the settled doctrine of *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448 (1957). This court there held that the District Courts can enjoin parties to proceed to arbitration without reference to any of the provisions of Norris-LaGuardia.

> "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of §7 of the Norris-LaGuardia Act." 353 U. S. at 458-59.

If the commandment below, that no injunction issue unless the requirements of §7 of the Act have been met, is allowed to stand there is a serious conflict with *Lincoln Mills* and the decisions following it.

3. The refusal of the Court of Appeals to enforce the status quo provision of this collective bargaining agreement has seriously weakened an effective safeguard of industrial peace. Labor contracts in the newspaper industry, and elsewhere, provide for maintenance of conditions prevailing at the time the dispute arises pending the arbitral hearing and determination. This preserves industrial peace. The right of both parties to a labor contract to enforce their mutual status quo commitments should be recognized and protected, unless clearly proscribed by statute. Otherwise, the willingness to resort to arbitration will be weakened and the tendency to resort to self help and extra contractual pressures will be encouraged.

4. Moreover, the decision of the Court of Appeals below erroneously equates the situation in the instant case with the situation in *Sinclair Refining Co. v. Atkinson*, 370 U. S. 195 (1962), wherein the Union's activities were specifically protected by §4 of Norris-LaGuardia. There, the majority held that no injunction could issue, in a §301 suit, against conduct which §4 unequivocally says may not be enjoined. That notwithstanding, the majority recognized that the District Courts retained jurisdiction to grant equitable relief in cases not specifically removed from the injunctive powers of the federal courts and did not, as does the decision below, require that all such cases meet the further requirements of §7 of Norris-LaGuardia.

§7 of Norris-LaGuardia—which speaks of "injury to complainant's property"—need not and, in the light of

Lincoln Mills and its progeny, does not apply to situations outside its ambit. The decision below, in effect, recognized the difficulty of trying to force cases like the one at bar into a §7 mold when it said:

> "Not only have these [§7] requirements not been met in the present case but it would clearly be impossible for the court to make the required findings." 317 F. 2d at 627.

Nevertheless, the decision below gave §7 a sterile, inflexible and unnecessary reading to reach the anomalous conclusion it did. In so doing it eliminated the District Courts' equitable power to grant, in the instant case and all others like it, relief "indispensable to the effective enforcement of an arbitration scheme in a collective agreement" and "essential to the uncrippled performance of the Court's function under §301", 370 U. S. at 216-17 (minority opinion).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. HUGHES,
Counsel for Petitioner.

August 16, 1963

APPENDIX A

SECTIONS 4 AND 7, NORRIS-LAGUARDIA ACT

"SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, §4, 47 Stat. 70, 29 U.S.C. §104.

* * *

"SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

Appendix A

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. Mar. 23, 1932, c. 90, 47 Stat. 71, 29 U. S. C. §107."

APPENDIX B

OPINIONS BELOW

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 347—October Term, 1962

(Argued May 1, 1963 Decided May 20, 1963)

Docket No. 27992

PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, The New York Times Company),

Plaintiff-Appellee,

v.

NEW YORK MAILERS' UNION NUMBER SIX,

Defendant-Appellant.

Before:

CLARK, SMITH and HAYS, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Thomas F. Murphy, Judge, compelling arbitration as to certain union action alleged to be in violation of a collective agreement and staying such action pending arbitration.

Affirmed to the extent that the order compels arbitration; reversed as to that part of the order which stays action by the Union. 29 U. S. C. § 101ff.

SIDNEY SUGARMAN, New York, N. Y. *for appellant.*

ANDREW L. HUGHES, of Townley, Updike, Carter & Rodgers, New York, N. Y. (Joel T. Cameche, of counsel) *for appellee.*

Appendix B

Hays, *Circuit Judge*:

The district court granted plaintiff's motion to compel arbitration of an alleged violation by the Union of a collective agreement and for a stay of the Union's action pending such arbitration. We affirm the order compelling arbitration but reverse the order granting the stay because of failure to comply with the requirements of the Norris-LaGuardia Act, 29 U. S. C. § 101ff.

The Publishers' Association and the Mailers' Union were parties to a collective agreement. As is common in the printing and publishing trades the collective agreement required that foremen in the shops of the members of the Publishers' Association be members of the Union. Section 20-C of the collective agreement provided:

> "the Union shall not discipline the Foreman for carrying out the instructions of the Publisher or his representative."

The agreement contained a broad arbitration clause providing for the submission to arbitration of "all disputes (except discharge cases) arising out of the operation of this agreement, all disputes regarding the interpretation of any portion of this agreement and any and all disputes (except discharge cases) arising out of, relating to, or affecting the operation of this contract."

Rowan, a foreman at the *Times*, which is a member of the Association, gave an employee named Kelly, a fellow union member, a disciplinary lay-off of one week as a penalty for certain conduct in the shop. Kelly filed charges against Rowan with the Union, alleging that Rowan had violated the Union's constitution by the action which he

took against Kelly. The Union membership voted to consider the charges and an investigating committee was appointed. The Association submitted a grievance against the Union charging that the Union's action on Kelly's complaint constituted a violation of Section 20-c, *supra*.

The Union refused to arbitrate the Association's grievance and the Association commenced the present action to compel arbitration and to stay any further action by the Union in processing Kelly's charges.

We hold that the district court correctly ordered the Union to proceed to arbitration. The dispute, in the words of the arbitration clause, *supra*, is one "arising out of, relating to, or affecting the operation of" the collective agreement. The only reservation of any dispute from the applicability of the arbitration process which might be thought of as raising any doubt of the arbitrability of the Association grievance is a clause providing that "local union laws not affecting wages, hours, or working conditions and the General Laws of the International Typographical Union shall not be subject to arbitration." We would have to resolve such a doubt, if one existed, in favor of arbitrability.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

United States Steelworkers v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582-83 (1960).

Appendix B

It would seem reasonable that if the court could properly compel arbitration it could stay, pending arbitration, the acts which are alleged to violate the collective agreement and are the subject of the arbitration procedure. But wherever a question of the availability of an injunction arises in a labor context we are called upon to consider the effect of the Norris-LaGuardia Act. That Act limits severely the power of a federal court to issue an injunction in a case involving or growing out of a labor dispute. It is quite clear that the union's action on the Kelly charges both involves and grows out of a labor dispute.

Absent Section 301 of the Labor-Management Relations Act (29 U. S. C. §185), there could hardly be any question that the power of the court to enjoin a violation of a collective agreement would be limited by the Norris-LaGuardia Act. If the court has power to enjoin the alleged violation in the present case it has that power only by virtue of the power to compel arbitration which is conferred by Section 301. But we are then faced with exactly the situation with which the Supreme Court dealt in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962). There the Court was called upon to enjoin strikes or work stoppages which were alleged to be violative of a collective agreement providing for arbitration. The Court, holding that the Norris-LaGuardia Act prevented the issuance of such an injunction, stated that there was "no conflict" between an employer's right to compel arbitration and his inability to secure an injunction against the alleged violation which was the subject of the arbitration.

> "The plain fact is that §301, as passed by Congress, presents no conflict at all with the anti-

injunction provisions of the Norris-LaGuardia Act. Obedience to the congressional 'commands' of the Norris-LaGuardia Act does not directly affect the 'congressional policy' in favor of the enforcement of agreements to arbitrate grievance disputes" at all for it does not impair the right of an employer to obtain an order compelling arbitration of any dispute that may have been made arbitrable by the provisions of an effective collective bargaining agreement. At the most, what is involved is the question of whether the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in § 301 to sue for breach of a collective agreement. And as we have already pointed out, Congress was not willing to insure that enjoyment to an employer at the cost of putting the federal courts back into the business of enjoining strikes and other related peaceful union activities.

"*Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, at 458-59."

370 U. S. at 213-14.

It is true that in the *Sinclair* case the Court was dealing with alleged contract violations which involved activities removed from federal jurisdiction by Section 4 of the Norris-LaGuardia Act, while in the present case the Union must be held to have failed to establish that the activities which have been enjoined are included in any of the categories of Section 4. However, Section 7 of the Act[1] covers

1. "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary

activities which are not covered by Section 4. Section 4 withdraws power to issue an injunction against certain

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restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however*, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit or in equity."

29 U. S. C. §107.

activities. Section 7 applies to injunctions in *any* cases involving or growing out of a labor dispute and prohibits the issuance of injunctions in all such cases, without regard to the nature of the activities against which the injunction is sought, unless certain procedural requirements are met and unless the court issuing the injunction makes certain findings. Not only have these requirements not been met in the present case but it would clearly be impossible for the court to make the required findings.

In the *Sinclair* case, *supra*, the Supreme Court examined the legislative history of Section 301 and found there extensive evidence to support the view that Congress in adopting Section 301 did not intend to repeal the Norris-LaGuardia Act. While, as we have indicated, *Sinclair* involved activities which fell within Section 4 of the Norris-LaGuardia Act, it would be very difficult indeed to make out from the legislative history, as it is set forth in *Sinclair*, a congressional intent to repeal Section 7 of the Act and to leave Section 4 intact. There is nothing whatever in that history on which to base any supposition that Congress intended to treat any part of the Norris-LaGuardia Act differently from any other part. Indeed the subtlety of a partial repeal would be even more difficult to derive from the legislative history than would total repeal, the possibility of which the Court rejected.

Moreover there is no ground in reason or policy for assuming that Congress intended to repeal Section 7 but not Section 4. If we were to assume the contrary we would reach the anomalous result that, while an employer could not enjoin a strike or other Section 4 activity in

violation of a collective agreement pending arbitration of the violation, he could enjoin any other type of violation. Ordinarily a strike would be far more disruptive of the contract relationship, and far more inimical to the statutory ideal of peaceful solution through the arbitration process than would the type of violation with which we are dealing in the present case. If Congress by adopting Section 301 had made any exception to the Norris-LaGuardia Act it would surely have permitted the use of the injunctive remedy against strikes in violation of collective agreements rather than against violations of a much less serious character.

Since, then, the Norris-LaGuardia Act prevents the issuance of the stay which was granted by the district court, we must reverse that part of the order.

The order of the district court is affirmed to the extent that it compels arbitration and reversed to the extent that it enjoins the action of the union.

Appendix B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

62 CIV. 3224

PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, THE NEW YORK TIMES COMPANY),

Plaintiff,

against

NEW YORK MAILERS' UNION NUMBER SIX,

Defendant.

MEMORANDUM

MURPHY, D. J.

Motion by plaintiff to compel arbitration and for an order restraining the defendant union from proceeding with certain disciplinary measures.

The facts here are more persuasive for granting relief to plaintiff than in Publishers' Association of New York City (on behalf of its member, The New York Times Company) *v.* New York Typographical Union No. 6 (62 Civ. 3024), decided this day.

Here the proposed disciplinary proceedings relate directly to a clause in the Collective Bargaining Agreement which is contrary to proposed proceedings by the union. In this case James Kelly accuses Everett Rowan, a foreman of the New York Times mail room, of making a mistake on one of the orders he had made up and threatened that the next mistake would cause Kelly to be

discharged. In addition, Rowan actually threatened him with a week off and enforced such order. Under the terms of the bargaining agreement §20-a vests exclusive operation, authority and control of the mail room in the plaintiff through its foreman. Section 20-b gave the foreman the right to hire and discharge all employees working in the mail room. Section 20-c provides: "The union shall not discipline the foreman for carrying out the instructions of the publisher or his representative." Section 33-b provides for arbitration "for settlement of all questions which may arise as to the scale of wages, all disputes regarding the interpretation of any portion of this agreement and any and all disputes (except discharge cases) arising out of, relating to or affecting the operation of this contract." This is an extremely broad arbitration clause and certainly broad enough to include the present dispute, plus the fact that §20-c prohibits the disciplining of plaintiff's foreman. Certainly this must include the filing of charges against him.

All of the arguments advanced by the union have, in our opinion, been correctly answered in Macneish *v.* New York Typographical Union No. 6, 205 F. Supp. 558 (S. D. N. Y., 1962) and further discussion of them would serve no useful purpose.

Our function is limited in cases such as these to ascertaining whether the parties seeking arbitration are making a claim which on its face is governed by the Collective Bargaining Agreement. Doubt should be resolved in favor of coverage. Here we have no doubt whatsoever. The motion is granted.

Settle order.

THOMAS F. MURPHY,
U. S. D. J.

Dated, New York, N. Y., November 12, 1962.

APPENDIX C

EXCERPTS FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

SECTION 4. Superintendents and Foremen and Assistant Foremen of Mailing and Delivery Departments shall be appointed and may be removed by the Publisher, and shall be members of New York Mailers' Union No. 6. Superintendents', Foremen's and Assistant Foremen's wages and hours shall be a matter of mutual agreement between the Publisher and the individual. They shall supervise and attend to all work as specified in this agreement. Their wages, however, shall not be lower than the basic wage scale and their hours of work shall not exceed the hours prescribed in Sections 9 and 10. The designated Assistant Foreman shall have the power and the authority of a Foreman or Superintendent in case of their absence. Any Foreman or Assistant Foreman who does not confine his activities exclusively to executive or clerical work is subject to the journeyman hours and overtime provisions.

SECTION 20-c. The Union shall not discipline the Foreman for carrying out the instructions of the Publisher or his representative.

SECTION 33-b. To the Joint Standing Committee shall be referred for settlement all questions which may arise as to the scale of wages, all disputes (except discharge cases) arising out of the operation of this agreement, all disputes regarding the interpretation of any portion of this agreement and any and all disputes (except discharge cases) arising out of, relating to, or affecting the operation of this contract. The Joint Standing Committee must meet within five (5) days from the date on which either party hereto, through its authorized representative, notifies the other party in writing that a meeting is desired, and shall

proceed forthwith to settle any questions before it. Such decision to be final and binding on both parties to this contract.

SECTION 34. It is agreed that fruitless controversies must be avoided and every effort made to maintain harmonious relations. To accomplish this, both parties will in every instance give prompt attention to disputes and will in good faith endeavor to settle all differences by conciliation between the Chapel Chairman and the Foreman, or, if necessary, between the officials of the Union and the employer. In the event that a decision is not reached by conciliation then the difference may be referred to the Joint Standing Committee as herein provided. Pending decision (in all except discharge cases) conditions existing prior to the dispute shall be maintained. However, no condition which has existed for thirty (30) days prior to a complaint in writing shall be changed, pending the decision of the Joint Standing Committee.

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PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, THE NEW YORK TIMES COMPANY), *Petitioner*,

v.

NEW YORK MAILERS' UNION NUMBER SIX, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

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PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, THE NEW YORK TIMES COMPANY), *Petitioner*,

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NEW YORK MAILERS' UNION NUMBER SIX, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

Respondent, New York Mailers' Union Number Six, submits this brief in order (1) to inform the Court more precisely and accurately of the question presented by the judgment below sought to be reviewed, and (2) to oppose the petition herein as improvident.

Petitioner's statement of the question presented, even if one accepts the imperfect form of its general casting, completely elides the crucial point in the Court of Appeals decision. It held that, while the acts enjoined by the District Court did not fall within Sec. 4* of the Norris-LaGuardia Act, they nevertheless involved and grew out of a Sec. 13 "labor dispute" and therefore were governed by the unsatisfied jurisdictional requirements of Section 7 of that Act.

The question actually presented is whether, notwithstanding that this case involves a "labor dispute" within the meaning of § 13 of the Norris-LaGuardia Act, the District Court may enjoin the operation of internal union disciplinary proceedings without meeting the conditions prescribed in Section 7 of that Act. As the court below correctly held, this question has already been answered in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195. "The plain fact is that § 301, as passed by Congress, presents no conflict at all with the anti-injunction provisions of the Norris-LaGuardia Act." 370 U.S. at 213. In the face of this general holding with respect to "anti-injunction provisions" petitioner's claim that the *Sinclair* holding was limited to the prohibitions of Section 4 of Norris-LaGuardia is simply untenable.

The factual context in which the case arose is amply set out in petitioner's Statement of the Case, with a

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* Respondent had pleaded and argued below that the acts were covered by Sec. 4(b) in that they were essential, integral incidents of Kelly's and Rowan's "becoming and remaining" members of respondent Union. Both courts below erroneously, we think, rejected that contention. Should this Court grant the petition herein, respondent wishes to reserve that contention for review and for support of the judgment below. See *Walling* v. *General Industries Co.*, 330 U.S. 545, 547.

single but vital exception. It fails to make clear that the Union acts enjoined by the District Court were internal *investigatory* proceedings required by the Union constitution and bylaws to be initiated against its member, foreman Rowan, upon a charge filed against him by a fellow member, Kelly, looking toward Rowan's possible discipline for his alleged misconduct toward Kelley while acting as the latter's foreman. As such, the acts so enjoined by the District Court "until the (ordered) arbitration could be heard and decided," as petitioner puts it, were explicitly found by the Court of Appeals to have involved and grown out of a labor dispute.

The unanimous opinion of the Court of Appeals in reversing the order of the District Court "to the extent that it enjoins the action of the Union", contrary to the prohibitions of Sec. 7 of Norris-LaGuardia, is thoroughly clear and correctly to the point. Petitioner's critical analysis of the Court of Appeals decision, and the stated Reasons for Granting the Writ, merely attempt to revive unavailing arguments urged upon this Court and laid to rest in *Sinclair*.

Petitioner's present reprise on the points thus adjudicated, notwithstanding *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), is but plaintive commentary on disappointed views already fully expressed that the cause of arbitration might be further advanced if the bars on *all* labor injunctions were lowered. But even on this score petitioner's espousal of the cause of arbitration seems more academic than real. At no time since November 20, 1962, when the District Court ordered arbitration, and despite the Court of Appeals' affirmance thereof, has petitioner moved the dispute to hearing and determination by

that expeditious process. Indeed respondent has at all times refrained at petitioner's request from taking the disputed action open to it since freed from injunction by the Court of Appeals decision of May 20, 1963. It ill. behooves petitioner to burden this Court with its plea of right to injunctive relief "ancillary" to an arbitration which inexplicably it has stalled for almost one year. The injunction would seem to be the end in itself to be desired, else it is doubtful that an actual, justiciable controversy exists at all.

In all events, however important the question of federal law presented may once have been, it was definitely settled by this Court in *Sinclair, supra.* The decision of the Court of Appeals herein sought to be brought up for review is in no way in conflict with the settled doctrine of *Sinclair* or with any other applicable decisions of this Court, but indeed conforms therewith exactly in principle and logic, *a fortiori.* Finally, the petition alleges no conflict, between the instant decision and that of any other Court of Appeals on the same matter.

For all the foregoing reasons, and no other proper or sufficient consideration appearing to move this Court's sound judicial discretion, the petition should be denied.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 384

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ETC.,

Petitioner,

—vs.—

NEW YORK MAILERS' UNION NUMBER SIX,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 384

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, ETC.,

Petitioner,

—vs.—

NEW YORK MAILERS' UNION NUMBER SIX,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

Opinions Below

The opinion of the Court of Appeals (R. 48-54) is reported at 317 F. 2d 624. It reversed in part an order of the District Court for the Southern District of New York. The opinion of the District Court (R. 3-4) is unofficially reported at 52 LRRM 2101.

Jurisdiction

The order and judgment of the Court of Appeals was entered on May 20, 1963. The petition for a writ of certiorari was filed August 17, 1963, and was granted on November 12, 1963, 375 U. S. 901. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Statutes Involved

The statutes involved are Sections 4 and 7 of the Norris-LaGuardia Act, 29 U. S. C. §§ 104, 107; Section 301(a) of the Taft-Hartley Act, 29 U. S. C. § 185(a), and Sections 3, 4 and 6 of the United States Arbitration Act, 9 U. S. C. §§ 3, 4 and 6. These statutes are set forth in the Appendix.

Question Presented

Whether Section 7 of the Norris-LaGuardia Act applies to an order of a district court staying certain internal union proceedings pending arbitration compelled by the court, where the stay is based upon a "status quo" provision in the collective bargaining agreement designed to preserve the issue sought to be arbitrated and does not relate to any activity enumerated in Section 4 of Norris-LaGuardia.

Statement of the Case

A. *The Parties*

Petitioner, Publishers' Association of New York City (hereinafter the "Association"), is the collective bargaining agent for its members, publishers of daily newspapers in New York City, in their negotiations with most of the unions representing their employees. The Association also provides services in connection with grievances brought to arbitration by either party under the collective bargaining agreements.

Respondent, New York Mailers' Union Number Six (hereinafter the "Union"), represents employees in the mailrooms of the members of the Association, including The New York Times Company (hereinafter the "Times"), and was and is party to a collective bargaining agreement with the As-

sociation. The Union is a subordinate local of the International Typographical Union (hereinafter the "ITU"), and is subject to the Constitution, By-Laws and General Laws of the ITU.

B. *The Grievance*

Foremen are required to be members of the Union under the collective bargaining agreement with this Union (Contract, § 4, R. 6). Such a clause has historically been a part of labor contracts with mechanical unions in the newspaper industry in New York City. However, because foremen are the representatives of management and because management is held accountable for their actions, the Association and its members have consistently endeavored to protect foremen from any form of union discipline relating to the performance of their duties. The importance of this position to the Association is set forth in the affidavit of C. Raymond Hulsart, Director of Industrial Relations at the Times, submitted in support of the motion to compel arbitration and to stay the internal Union disciplinary proceedings (R. 22-24). This Union agreed to a contractual provision prohibiting discipline of the foreman. Section 20-e of the collective bargaining agreement provides:

> "The Union shall not discipline the Foreman for carrying out the instructions of the Publisher or his representative" (R. 6).[1]

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[1] This clause was relied upon by the Union in this Court in *Labor Board* v. *News Syndicate Co.*, 365 U. S. 695 (1961), and in the Court of Appeals in that case, 279 F. 2d 323 (2d Cir. 1960), to support the legality of the foreman membership clause and to defend against a finding of discrimination by the foreman against a nonunion employee made by the Board against the employer and the Union. Justice Douglas, writing for the majority, based his determination that the foreman membership clause was not unlawful at least in part upon the existence of Section 20-e, which he quoted (365 U. S. at 696), and referred to in determining that "the foremen [are] '*solely* the employers'

Despite this provision, the Union notified Everett Rowan, a foreman at the Times, that charges had been filed against him by James Kelly, a member of the Union (R. 14), and that he (Rowan) was summoned to appear before the Union concerning the charges (R. 15). The charges (R. 12, 13) clearly related to work performance by Kelly and to the performance of his managerial duties by Rowan.

The Association promptly protested (R. 16) and demanded arbitration if the Union did not withdraw the charges against Rowan. It also demanded that the status quo be maintained in accordance with Section 34 of the contract.[2] The broad arbitration clause (§ 33) and the status quo clause (§ 34) are set forth in the Record, pp. 6-8. It was the Association's position that the act of summoning the foreman down to the Union offices to answer charges in and of itself constituted discipline in violation of Section 20-c of the contract (R. 21, 22).

The Union refused to arbitrate and declined to honor the status quo clause, calling the Association's protest, grievance, and demand "officious intermeddling" (R. 17, 18).

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agents,' as the Court of Appeals concluded." (id. at 699.) Indeed, the Court of Appeals had said that because of this clause the foremen "were not subject to the conflicting obligations of two masters" (279 F. 2d at 330).

[2] In the newspaper industry, at least, preservation and enforcement of the status quo clause is of prime importance. Our product is extremely perishable. If the papers are not out on time, they might as well be discarded. The product cannot be stockpiled in anticipation of work stoppages and sales lost on any day are lost forever. The alternatives to status quo and arbitration are surrender to unwarranted union demands or breach-of-contract work stoppages. The Board recognized the Association's vulnerability in this regard in *Publishers' Association (Mailers' Union)*, 139 NLRB 1092, 1099 (1962), appeal argued No. 27,943, 2d Cir. October 25, 1963. Therefore, while the status quo clause often restricts management in making changes protested by the unions, management is willing to suffer such delays so long as production of its product continues without interruption pending arbitration. The

C. *The Court Proceedings Below*

The Association proceeded in district court to compel the Union to arbitrate. In order that its rights would not be frustrated before the arbitration could be heard and decided, it also sought a stay of any proceedings by the Union against Rowan. By order to show cause, the Association obtained a temporary restraining order pending the hearing of the motion (R. 18-19). Jurisdiction of the federal court was invoked under both Section 301 of the Taft-Hartley Act and the United States Arbitration Act, 9 U. S. C. § 1 et seq. (R. 5). Because the jurisdiction of a federal district court to compel arbitration in an action pursuant to Section 301 had been clearly declared by this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), the Association proceeded in the more cumbersome form of a plenary suit, rather than the more flexible petition procedure permitted by Sections 4 and 6 of the Arbitration Act.[3]

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promise to maintain conditions pending arbitration is a mutual one and the unions should be required to honor it where the grievance is filed by the employer, just as the employers honor it where the union is the grievant.

[3] Some doubt has been raised as to the applicability of the Arbitration Act and its procedures in this area. *See, e.g., Poch* v. *New York Typographical Union*, 223 F. Supp. 181 (S. D. N. Y. 1963), where the district judge noted (p. 183), "disagreement between circuits over the question whether collective bargaining agreements in non-transportation industries are excluded from the Arbitration Act as 'contracts of employment' (9 U. S. C. § 1) has never been explicitly settled by the Supreme Court." It is submitted that on the reasoning of Judge Frank, in *Signal-Stat Corp.* v. *Local 475, etc.*, 235 F. 2d 298 (2d Cir. 1956), cert. den. 354 U. S. 911 (1957), and Judge Medina in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F. 2d 402 (2d Cir. 1959), cert. dismissed per stipulation 364 U. S. 801 (1960), the procedures under the Arbitration Act should be declared available to all parties properly before the federal courts in matters relating to arbitration. *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254 (1962), while silent on the statutory basis for the stay of the damage action pending arbitration, does im-

The district court granted the motion to compel arbitration and restrained the Union from proceeding with its disciplinary proceedings (R. 2, 3-4).[4] The Union appealed to the Court of Appeals where that part of the order compelling arbitration was affirmed, but the part staying the disciplinary proceedings by the Union was reversed (R. 55). The Court of Appeals based the reversal of the stay on its conclusion that Section 7 of the Norris-LaGuardia Act applied and precluded any injunctive relief where its procedural requirements had not and could not be met.

The arbitration proceeding has been held in abeyance pending the petition for certiorari and the review by this Court. The Union, although freed from the restraining order, agreed voluntarily to withhold further action in the disciplinary proceedings until after the determination by this Court.

Summary of Argument

A. Enforcement of a status quo clause in a collective bargaining agreement by a federal district court (where the activity enjoined is not conduct enumerated in Section 4 of Norris-LaGuardia) stands on the same footing as enforcement of an arbitration clause. If an order compelling arbitration is exempt, an order preserving the status quo pending arbitration should likewise be exempt

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judicially hold that the Arbitration Act procedures are available to litigants in federal court in Section 301 suits, since the union's application for the stay in district court was based upon Section 3 of the Arbitration Act (196 F. Supp. 148).

[4] As noted in his memorandum opinion, Judge Murphy on the same day compelled arbitration and granted a stay of union discipline of two composing room supervisors by the Typographical Union in *Publishers' Association v. New York Typographical Union No. 6*, 62 Civ. 3024, S. D. N. Y. 1962 (not officially reported). No appeal from the order in that case has been perfected in the Court of Appeals.

from the requirements of Section 7 of the Norris-LaGuardia Act. The "injunction" granted by the district court here is more akin to the mandatory injunction compelling arbitration approved by this Court in *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), than to the injunction restraining a strike disapproved in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1952). The Court of Appeals should have applied *Lincoln Mills* and not *Sinclair*.

B. The congressional policy of encouraging and supporting private settlement methods to resolve labor disputes requires the granting of the ancillary relief sought here.

C. Section 7 of the Norris-LaGuardia was not designed to deprive the federal courts of their inherent power to protect and make effective their mandates involving activities not prohibited by Section 4 of that Act. The power to stay a judicial proceeding on an issue subject to arbitration, whether based upon the inherent power of the court or Section 3 of the Arbitration Act, is not subject to the requirements of Section 7 of the Norris-LaGuardia Act. Similarly, the power to stay internal union proceedings on an issue subject to arbitration, which is based upon a contractual promise to maintain the status quo pending arbitration should not be subject to the inappropriate requirements of Section 7 of Norris-LaGuardia Act.

ARGUMENT

I.

Lincoln Mills governs this case. Since Section 7 of Norris-LaGuardia does not apply to mandatory injunctions compelling arbitration of labor disputes, it should not apply to a stay of non-Section 4 activities designed to preserve an issue for arbitration.

The main vice of both the Union's and Judge Hays' analyses is that this case is not, as Judge Hays suggested (317 F. 2d at 626), "exactly the situation" with which this Court dealt in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195 (1962). *Sinclair* involved proposed injunctive action against not one, but three separate activities all categorically protected by the unequivocal language of Subdivisions (a), (e) and (i) of Section 4 of the Norris-LaGuardia Act. (Act of March 23, 1932, 42 Stat. 70, c. 90, 29 U. S. C. 104(a), (e) and (i).) The Union actions stayed by the district court in the instant case were clearly not Section 4 activities. The court below so found.[5]

Textile Workers v. *Lincoln Mills*, 353 U. S. 448 (1957), controls the present case, not *Sinclair Refining*. *Lincoln Mills* and the instant case, unlike *Sinclair*, involve non-Section 4 activity. The plaintiff in *Lincoln Mills* sought the same basic relief the Association requested and obtained from the district court. The only difference between *Lincoln Mills* and the present case is that the recalcitrant party in *Lincoln Mills* (the employer) merely refused to

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[5] Judge Hays said:

"... in the present case the Union must be held to have failed to establish that the activities which have been enjoined are included in any of the categories of Section 4" (317 F. 2d at 626).

arbitrate. Here the Union not only refused to arbitrate but had initiated steps designed to deprive the inevitable arbitration of any effectiveness.

Despite his realization that this was not a Section 4 case, Judge Hays felt that Section 7 of Norris-LaGuardia (29 U. S. C. 107) applied. This same argument was made and rejected in *Lincoln Mills*. This Court dismissed this contention then because:

> "The failure to arbitrate was not a part and parcel of the abuses against which the Act was aimed. Section 8 of the Norris-LaGuardia Act does, indeed, indicate a congressional policy toward settlement of labor disputes by arbitration, for it denies injunctive relief to any person who has failed to make 'every reasonable effort' to settle the dispute by negotiation, mediation or 'voluntary arbitration'. Though a literal reading might bring the dispute within the terms of the Act (citation omitted), we see no justification in policy for restricting § 301a to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act. . . . The congressional policy in favor of the enforcement of the agreements to arbitrate grievance disputes being clear, there is no reason to submit them to the requirements of § 7 of the Norris-La Guardia Act (353 U. S. at 458-459)."

The same considerations apply *a fortiori* to the instant litigation.

The Union has not only agreed to arbitrate any dispute but has specifically agreed that "pending decision . . . conditions existing prior to the dispute shall be maintained" (¶ 34, R. 8). The latter provision necessarily complements the former. It exists in order that one party may not, by

changing the status quo, deprive the other of the benefits intended by the mutual promise to arbitrate all disputes. The Union is not making "every reasonable effort" to settle this case by "voluntary effort" (Norris-LaGuardia, Sec. 8, 29 U. S. C. 108). It is doing exactly the opposite. It is making sure that any arbitration of this dispute will be an idle gesture. Norris-LaGuardia condemns rather than protects the Union's conduct. We submit that the "congressional policy in favor of the enforcement of agreements to arbitrate" (*Lincoln Mills* at 458) is as much at stake here. Consequently, there is no reason to require the Association to run the gauntlet of Section 7 in order to obtain specific enforcement of both the Union's agreement to arbitrate and its supplementary agreement to maintain the status quo pending arbitration.

This distinction between Section 4 and non-Section 4 activities has been specifically recognized by this Court on several occasions. In *Sinclair Refining* itself, this Court noted that:

> " . . . the equitable relief granted in that case [i.e. *Lincoln Mills*]—a mandatory injunction to carry out an agreement to arbitrate—did not enjoin any one of the kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of the United States courts" (370 U. S. at 212).

Earlier, in *Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330 (1960), the railroad argued that Norris-LaGuardia had not prevented the issuance of labor injunctions in the past. This Court answered (at 338) that none of the cases (except *Bhd. of Trainmen* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30 (1957), a clear Section 4 case) cited by the railroad "enjoined conduct which the Norris-

LaGuardia Act withdrew from the injunctive power of the federal courts". However, it was clear that, as in *Lincoln Mills*, the literal terms of Section 7 covered every case and, in fact, the applicability of Section 7 had been vigorously pressed in several (i.e. *Graham* v. *Bhd. of Firemen*, 338 U. S. 232, 238-239 (1949) and *Bhd. of R.R. Trainmen* v. *Howard*, 343 U. S. 768, 774 (1952)).

The distinction that this Court has drawn both before and in *Sinclair* has been recently endorsed by the Fourth Circuit in *Parks* v. *IBEW*, 314 F. 2d 886 (4th Cir.), *cert. denied* 372 U. S. 976 (1963). *Parks* involved a local's request that the international union be enjoined from revoking its charter and also restrained from replacing it with another local. Even though the Fourth Circuit admitted that the congressional policy in favor of enforcement of inter-union contracts was not as clearly-defined as that favoring enforcement of promises to arbitrate, it granted the injunctive relief. This Court denied certiorari. The Fourth Circuit said that *Lincoln Mills* applied, not *Sinclair*, since the injunctive relief sought did not transgress any Section 4 activity (See 314 F. 2d at 918, especially n. 57). It concluded that, though Section 7's language did cover the case, it would follow this Court's lead and not insist on that section's procedural requirements in a non-Section 4 case.

We submit that Section 4 represents the limit of the full applicability of the Anti-Injunction Act when that application conflicts with a clear congressional policy such as that favoring enforcement of undertakings to arbitrate. This is the lesson of *Sinclair* and the only "plainly expressed congressional purpose" involved in this case. [Cf. *Sinclair Refining* v. *Atkinson*, 370 U. S. 195, 213 (1962).]

Syres v. *Oil Workers Int'l Union*, 350 U. S. 892 (1955) presented a similar situation. There, the question was

whether a lower court injunction against racial discrimination in the application of a collective agreement should be allowed to stand. This Court did not disturb the injunction because of the clear policy against such racial discrimination [e.g. *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192 (1944)]. See *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 458 (1957). In like manner, this Court has sanctioned injunctions where they were necessary to (1) force a union to submit minor disputes to the Railroad Adjustment Board, *Trainmen* v. *Chicago River and Ind. R. Co.*, 353 U. S. 30 (1957); (2) compel an employer to bargain with a certified union, *Virginia Railway* v. *System Federation*, 300 U. S. 515 (1937) and (3) prohibit a labor union from agreeing with employers to violate the anti-trust laws, *Allen Bradley Co.* v. *Local 3*, 325 U. S. 797 (1945). All these decisions were implementing clear federal labor policies and in each case the language of Norris-La Guardia, though technically applicable, was ignored.

The majority opinion in *Sinclair* said that Congress had rejected the argument that injunctions against peaceful strikes were necessary to make the arbitration process effective and, in so doing, "set the limit to which it was willing to go in permitting courts to effectuate the congressional policy favoring arbitration . . . " (370 U. S. at 213). Congress set this "limit" in Section 4. Norris-LaGuardia was intended to eliminate the abuses of the injunction not the injunction. See 75 Congressional Record 4630, 4677, 5491 (1932). Section 4 was deliberately designed to free from injunctions those concerted activities that were most important to organized labor and most subject to abuse by the prior era's "government by injunction".[6] Frank-

[6] "The kinds of acts which had given rise to abuse of the power to enjoin are listed in Section 4." *Lincoln Mills*, 353 U. S. at 458. See also *Chicago River*, *supra*, at 40-41.

furter & Green, *The Labor Injunction* (1930), esp. Ch. 1 at 517; Ch. 5. See Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 243 (1958). The Association agrees that the Anti-Injunction Act should be rigorously applied to a true Section 4 situation[7] [e.g. *Sinclair Refining Co., supra; Bowater S.S. Co.* v. *Patterson*, 303 F. 2d 369, 372 (2d Cir.), cert. den. 371 U. S. 860 (1962) and *Sperry Gyroscope Co.* v. *Hall*, 185 F. Supp. 64 (S. D. N. Y. 1960)]. However, that is not this case.

II.

The congressional policy endorsing private settlement methods would be defeated if a court having power to compel submission to those procedures could not stay action designed to frustrate that mandate.

This country has long been committed to the policy that it is preferable to settle labor disputes by negotiation, mediation and arbitration rather than by economic force. This policy was clearly expressed in Section 8 of Norris-LaGuardia itself (29 U. S. C. 108; see *Textile Workers* v. *American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953)) and was re-affirmed by Taft-Hartley.[8] This Court has said

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Judge Hays could find "nothing whatever" in the legislative history of 301 (29 U. S. C. 185) to indicate a Congressional intention to "treat any part of the Norris-LaGuardia Act differently from any other part" (317 F. 2d at 627). However, one of the subsections of 301 (i.e. 301e) expressly repealed Section 6 of the Norris-LaGuardia. The 1947 Congress apparently treated Section 6 differently. Also, *Lincoln Mills* holds that the 1947 Congress intended to treat Section 7 differently where the enforcement of agreements to arbitrate were involved.

[8] 29 U. S. C. 173(d) says:

"Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

that this policy can be effectuated only if the parties' settlement machinery "is given full play". *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 566 (1960). See also *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195, 225 (1962) (dissenting opinion). This full play cannot be established if the agreement to arbitrate can be frustrated by one of the parties.

This and other courts have responded to the invitation laid down in *Lincoln Mills* to establish a new federal common law of labor relations (353 U. S. at 451) by considering the potentially adverse effect on the arbitration process in resolving further questions in 301 suits. Considering the strong pro-arbitration policy set forth in *Lincoln Mills* and subsequent cases, "judicial inventiveness" (*Lincoln Mills* at 457) demanded no less throughout this "early stage of experience in this area". *Carey* v. *Westinghouse Electric Co.*, 32 U. S. L. WEEK 4080, 4083 (1/6/64) (concurring opinion). In *Chicago River, supra*, this Court said that the allowance of a strike over an arbitrable dispute would effectively defeat the jurisdiction of the arbitral tribunal. 353 U. S. at 39. Similarly, in *Teamsters* v. *Lucas Flour*, 369 U. S. 95 (1962), this Court implied a no-strike obligation into a collective agreement containing an unconditional promise to arbitrate. The main reason given was that:

> "a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare" (at 105).

In short, this Court has expressed the view that an effective arbitration procedure is a basic element of the federal common law developed since *Lincoln Mills*.[9]

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[9] *Sinclair*, 370 U. S. at 216 (dissenting opinion). Lower federal courts have followed this Court's lead. The argument that arbi-

The only decision that has somewhat diminished the importance of arbitration has been *Sinclair Refining* and that particular result was required by the direct applicability of Section 4. Even in *Sinclair*, the majority opinion recognized the importance of not undercutting the right to arbitrate disputes. Justice Black pointed out that applying Section 4 did not in any way "impair the right of an employer to obtain an order compelling arbitration" (370 U. S. at 214). *Sinclair* denied the employer the "enjoyment" of an injunction against a strike in violation of contract in addition to damages for the breach of contract. Here, the basic and only relief sought is to compel meaningful arbitration. To compel arbitration and yet deny the stay, as the Second Circuit did, would allow the Union to emasculate any arbitration that may be held concerning this issue. This would clearly "impair" the Association's right to resolve disputes with the Union by arbitration.

A closer analogy is the pre-*Enterprise Wheel* situation. It was not clear until *United Steelworkers* v. *Enterprise Wheel Corp.*, 363 U. S. 593 (1960), that a federal court had jurisdiction in a 301 suit to order a party to abide by an arbitration award. *Lincoln Mills* had only ruled that arbitration could be compelled. The question of specific enforcement of an arbitration award under Section 301 first arose in *A. L. Kornman Co.* v. *Amalgamated Clothing Workers*, 264 F. 2d 733 (6th Cir.), cert. denied 361 U. S. 819 (1959), where the court concluded:

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tration should not be compelled if the dispute was arguably subject to the jurisdiction of the NLRB was rejected by the Second Circuit on this very ground. *Carey* v. *General Electric*, 315 F. 2d 499 (2d Cir.), petition for cert. filed 31 U. S. L. WEEK 3366 (May 2, 1963) (No. 114). It ruled (p. 509) that this could not be a valid objection to arbitration because the strong policy in favor of arbitration expressed in *Textile Workers* v. *Lincoln Mills* and *Steelworkers* v. *Warrior and Gulf* "might be immeasurably frustrated" if the recalcitrant party could prevent arbitration by this route. Cf. *Smith* v. *Evening News Ass'n*, 371 U. S. 195 (1962).

> "If the United States District Courts have jurisdiction and may order compliance with the grievance arbitration provisions of a collective bargaining agreement, they must necessarily have jurisdiction to enforce the resulting awards. To hold otherwise would render the entire arbitration machinery merely time-consuming and useless. Authority to compel arbitration carries with it authority to enforce the resulting award" (at 737).

The Fourth Circuit was more explicit in *Textile Workers* v. *Cone Mills Corp.*, 268 F. 2d 920 (4th Cir.), cert. denied 361 U. S. 886 (1959). They enjoined the employer from disregarding the award because:

> "The purpose of Congress to give effect to employer-union contracts and to afford full relief for breaches of those contracts would be frustrated if the courts should decree specific performance to agreements to arbitrate but deny enforcement to arbitration awards which the parties have agreed in advance to accept . . . [since] relief in the form of specific performance is as appropriate and as necessary in one case as the other to effectuate the Congressional will" (at 925).

Though the ultimate question was laid to rest by *Enterprise Wheel*, the above reasoning is appropriate for the present inquiry. The power to compel arbitration necessarily carries with it the power to compel adherence to the eventual award. It should also, for the identical reasons given in those cases, carry with it the power to make arbitration meaningful. Both types of supplementary relief are necessary to give "full play" to the particular promise to arbitrate and encourage resort to arbitration as a means of settling labor disputes. As Justices Burton and Harlan said in their concurrence in *Lincoln Mills*, "Having juris-

diction over the suit, the court was not powerless to fashion an appropriate federal remedy." 353 U. S. at 460.

The importance this and other courts have ascribed to the effective enforcement of contractual undertakings to arbitrate indicates why the submission of the mandatory injunction compelling arbitration to the "inapposite procedural requirements of Section 7" was not ordered by this Court in *Lincoln Mills* and should not have been ordered by the Second Circuit in the instant case. Those procedural requirements, by their nature,[19] could not have been intended to apply to orders enforcing agreements to arbitrate or agreements to maintain the status quo.

In *Lincoln Mills*, Justice Douglas cited *Local 205* v. *General Electric*, 233 F. 2d 85 (1st Cir. 1956), with approval to demonstrate the inappropriateness of applying Section 7. Chief Judge Magruder's detailed analysis in that case can scarcely be augmented. He concluded that the strictures of Section 7 need not be met as a prerequisite to compelling arbitration by reason of the "language and background of the Norris-LaGuardia Act itself" (233 F. 2d at 92). His remarks apply with equal force to the instant case where the basic relief sought is similarly the compelling of arbitration. Here, the union's collateral activities were undermining the very arbitration federal law requires it to join. If Judge Hays' reasoning and broad application of Section 7 were adopted, *Lincoln Mills* would be effectively overruled. Indeed, the congressional policy favoring arbitration would become, to paraphrase Chief Judge Magruder, a "snare and a delusion" (*Local 205* at 92).

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[19] For example, subparagraph (e) of Section 7, 29 U. S. C. 107(e), requires a finding that the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. Of course, the usual prerequisites for equitable relief found in Section 7, were applied by the district court here under Rule 65, F. R. Civ. P.

III.

The request for a stay is a simple appeal to the traditional ancillary jurisdiction of a court of equity and not a prayer for a labor injunction.

The Association's basic request is that the Union be required to abide by its contractual promise to arbitrate. Its request for a stay of the Union's attempts to discipline Rowan pending the arbitration of that issue is an appeal to the inherent equity power of the federal court for supplementary relief. And the supplementary relief is based upon a parallel promise to preserve the status quo until the arbitration is decided. This kind of judicial enforcement of a party's voluntary undertakings is a far cry from the kind of injunctions that Norris-LaGuardia was designed to prohibit or regulate. This Court has recognized the distinction between injunctions and ancillary stays. Compare *Baltimore Contractors Inc.* v. *Bodinger*, 348 U. S. 176, 184 (1955), with *Goodall-Sanford* v. *Textile Workers*, 353 U. S. 550, 551 (1957), and cf. *E. T. Simonds Construction Co.* v. *Local 1330*, 315 F. 2d 291, 295 (7th Cir. 1963). Many other cases have ruled that a stay issued in an equitable proceeding, such as a suit to compel arbitration, is not analogous to an injunctive order. See *Wilson Bros.* v. *Textile Workers*, 224 F. 2d 176 (2d Cir.), cert. den. 350 U. S. 834 (1955) and cases there cited: *Armstrong-Norwalk Rubber Corp.* v. *Local 283*, 269 F. 2d 618, 620-621 (2d Cir. 1959). Cf. *Turkish State Railways Admin.* v. *Vulcan Iron Works*, 230 F. 2d 108 (3rd Cir. 1956).

The Association's request that the Union be compelled to arbitrate, sustained by both lower courts, was the principal relief sought. The request for enforcement of the status quo clause was an appeal to that inherent equity jurisdiction which operates to ensure that judicial orders will not

be meaningless. The issuance of the stay by the district court is justified both by that court's ancillary jurisdiction to protect the efficacy of its mandates [see 1 Moore *Federal Practice*, 822-823 (2d Ed. 1955)] and its undoubted power under § 301(a) to enforce this provision of the collective bargaining agreement.

The drafters of Norris-LaGuardia recognized this long-established ancillary jurisdiction of a court of equity. They did not intend to impose any limitations on it. Senator Lewis, one of the Act's supporters, said:

> "There is no effort on the part of any Senator here on either side of the Chamber or on the part of any member of the committee, minority or majority, in any wise to affect—far less to reduce or destroy—the just jurisdiction of the courts in a full exercise of the equity power which is vested in the Federal courts by the Constitution of the United States." 75 Cong. Record 4754 (1932).

Senator Norris, one of the co-authors of the bill, made similar statements, viz:

> *Senator Norris*: . . . it is not an inherent power of a court, for instance, to be endowed with jurisdiction to issue injunctions, is it? An inherent power, as I understand, is one necessary to enable the court to protect itself, and so forth.
>
> *Senator Hebert*: To enforce its mandates.
>
> *Senator Norris*: Yes; but would not Congress have the right, *without interfering with any of its inherent powers*, to take any jurisdiction away from any inferior Federal Court? (75 Cong. Record 4682 (1932), emphasis supplied)

Further evidence that the drafters of Norris-LaGuardia fully appreciated the difference between inherent equitable

powers and a standard labor injunction is supplied by the language they employed. They used "injunction" in Sections 4, 5, 7, 9 and 10 and "injunctive relief" in Section 8. Yet, in Section 3 they forbade all "legal or equitable relief". This distinction indicates that the 1932 Congress certainly did not mean to withdraw all equitable relief by means of Section 7. Accord: *Local 205* v. *General Electric Co.*, 233 F. 2d 85, 91 (1st Cir. 1956), aff'd 353 U. S. 547 (1957).

As mentioned above, this collective bargaining agreement contains an express mutual promise to maintain the status quo pending decision of disputes (§ 34, R. 8). Section 6 of the Railway Labor Act contains a similar, albeit statutory, provision.[11] In *Bhd. of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), this Court re-established a status quo order. The railroads had instituted new work schedules despite a strike. They sought and obtained a preliminary injunction but were required to rescind their changes and maintain the status quo ante. The Fifth Circuit (266 F. 2d 335 [1959]) affirmed the injunction but refused to sustain the status quo requirement. This Court restored that condition. Speaking for a unanimous court,[12] Chief Justice Warren said that since *Bhd. of R.R. Trainmen* v. *Chicago River & Ind. R. Co.*, 353 U. S. 30 (1957), authorized the injunction, the status quo order was necessary

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[11] Section 6 says in part:

> "In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon. . . ." (45 U. S. C. 156)

Of course, this contract's status quo provision was voluntarily assumed by the parties and not imposed by statute.

[12] Justices Harlan and Stewart agreed that the status quo order was within the power of the district court to issue but would have remanded the case to the Fifth Circuit for review of the companies' contention that the district court had abused that discretion.

if that decision was not to be cut back. Since the injunction was proper, the status quo order was proper because it was "designed . . . to promote the interests of justice" and "to preserve the jurisdiction of the [National Railroad Adjustment] Board" (363 U. S. at 534). Herein, the same considerations apply. The order compelling arbitration is proper. Therefore, the specific enforcement of the related status quo provision is proper. It is designed to promote the interests of justice in that it carries out the parties' intentions. Equally important, it preserves the eventual arbitration order from being emasculated by unilateral union action.

Stays of court proceedings pending arbitration of the same dispute are common. United States Arbitration Act § 3, 9 U. S. C. § 3; N. Y. CPLR § 7503 (formerly N. Y. C. P. A. § 1451). See also, e.g., *Signal-Stat Corp.* v. *Local 475, etc.*, 235 F. 2d 298 (2d Cir. 1956); *Drake Bakeries* v. *Bakery Workers*, 196 F. Supp. 148 (S. D. N. Y. 1960); *In Re Julius Wile Sons & Co.* (Sup. Ct. N. Y. Co. 1949), 13 L. A. 733, and *In Re Atlantic Basin Iron Works* (Sup. Ct. N. Y. Co. 1951), 16 L. A. 641. These ancillary orders are so traditional an exercise of an equity court's jurisdiction that they are seldom considered injunctions though they often have a similar effect. We are not aware of any case holding that a supplementary decree having the same effect as an injunction must satisfy the appropriate anti-injunction statute. In *United States Pipe & Foundry Co.* v. *United Steelworkers*, 37 N. J. 343, 181 A. 2d 353 (1962), the employer brought a declaratory judgment suit for a declaration as to the arbitrability of certain grievances. He also requested a stay pending that judicial determination.[15]

[15] It is significant that the union did not argue that the stay request was an injunction until the main case was over and it became apparent counsel fees might be awarded if it could be styled as a request for an injunction. See 181 A. 2d at 361-362.

One of the questions presented was whether the stay request came under that state's "Little Norris-LaGuardia Act". This determination was crucial with respect to the request for counsel fees. The Supreme Court of New Jersey said:

> "The employer's action . . . is not an injunction suit at all in the sense that term is used in such laws. The instant action is actually nothing more than a declaratory judgment suit asking for a judicial declaration as to arbitrability of the particular grievance under the labor contract. *The prayer for an injunction amounts only to an ancillary request for a stay of the arbitration pending the determination*" (181 A. 2d at 361, emphasis added).

That is a correct characterization of this case since the basic relief sought here was the order compelling arbitration and the stay was ancillary relief.

Nor have courts hesitated to exercise this ancillary equity jurisdiction when it became necessary to stay non-judicial proceedings threatening an orderly resolution of the question by arbitration. Two cases have recently addressed themselves to this problem and both have stayed such collateral proceedings pending arbitration.

In *Old Dutch Farms Inc.* v. *Milk Drivers & Dairy Employees*, 222 F. Supp. 125 (E. D. N. Y. 1963), the union refused to continue an arbitration it had started with petitioner. Instead, it initiated another arbitration with other signatories to the same labor contract involving the same question. The union invited the petitioner to join this second arbitration or face "such action as may be necessary to enforce the contract without further notice" (at 131). As here, the union had embarked on a course unmistakably intended to nullify the first arbitration. The employer im-

mediately sued to compel the union to continue the first arbitration and to stay all other arbitrations on the same issue. The district judge granted the stay.

The district judge made two points. He said that the union had violated the covenant of fair dealing every contract contains. Although the *Dutch Farms* contract did *not* contain a status quo provision,[14] the judge felt that one must be supplied since every contract by implication contains:

> ". . . a covenant not to do anything that will destroy or injure the rights of others to receive the fruits of the contract; a covenant or implied obligation to cooperate with the other so that he may obtain the full benefits of performance" (at 130).

The court ruled that the union's conduct violated these implied covenants and issued an order enjoining it "from participating in any other arbitration proceeding involving the same issue until the pending proceeding . . . is completed" (at 131). Here, the same matter is involved in the proposed arbitration and in the internal union proceedings. In fact, the Union's conduct here will, if not stayed, more effectively nullify the meaning of the arbitration proceeding than the Union's activities in *Dutch Farms*. A refusal of the stay in *Dutch Farms* would have permitted the second arbitration to continue. Since that involved the identical issue the dispute would have ultimately received an arbitrator's consideration. Therefore, *Dutch Farms* pre-

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[14] The contract did contain a provision that an unsuccessful re-arbitration of the same issue would be penalized by fees and other costs which the court read as an undertaking not to multiply arbitration proceedings. However, the court admitted that the agreement was "silent as to what conduct the parties expected from each other once an arbitration proceeding was commenced" (at 130). The agreement here was not silent (See § 34, R. 8).

sented a much stronger case for refusal of the stay. That would not, as here, have entirely precluded effective arbitration of the dispute.

The other important aspect of *Dutch Farms* was the district court's treatment of the request to stay all other arbitrations involving the same issue. The court answered this in one sentence. It said:

> "The employer's application to enjoin the Union from arbitrating with other signatories was merely a prayer for relief incidental to its claim for breach of contract" (at 129-130).

That is this case.

Finally, *Macneish* v. *N. Y. Typographical Union 6*, 205 F. Supp. 558 (S. D. N. Y. 1962), which the district court judge in this case said answered all the present questions correctly (R. 4), is directly in point. The Association sought to compel arbitration and restrain the Union from going forward with proposed disciplinary proceedings against another Times foreman. Judge Bryan ordered arbitration and granted the stay. Norris-LaGuardia was neither discussed nor argued.[15]

This Court has sanctioned the issuance of stays of judicial proceeding pending arbitration. That was the relief sought in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962) and *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254 (1962). At no stage in either litigation was it ever suggested by court or counsel that the stay would contravene any labor statute of the United States or that the inappropriate procedural requirements of Section 7 of

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[15] See especially *Int'l Longshoremen* v. *Galveston Marine Ass'n*, 358 S. W. 2d 607 (Ct. Civ. App. Tex. 1962), where a trial court's injunction upholding the status quo was held a valid exercise of traditional equity jurisdiction.

Norris-LaGuardia be followed. This Court denied a stay in *Atkinson* and granted one in *Drake Bakeries*. In *Atkinson*, Justice White, for a unanimous Court, said that:

> "We are not satisfied from the record now before us . . . that any significant issue in the damage suit will be presented to and decided by an arbitrator" (at 243-244).

In the present case, the issue which the arbitrator will determine is integrally connected with the internal union disciplinary action. More important, *Atkinson* did not involve an explicit contractual promise to maintain the status quo. In fact, the opposite was the case. (See paragraph nine of the collective agreement, 370 U. S. at 253.)

In *Drake Bakeries, supra*, this Court upheld a stay of a federal court damage action pending completion of arbitration of the same issue. The crucial consideration, absent in *Atkinson*, was that the employer had expressly agreed to arbitrate all disputes. By ordering arbitration and staying the employer's district court suit pending that arbitration, the company was simply remitted to the forum it had chosen. Justice White said that the Court must be guided by what would in the particular context of each case "best promote industrial peace" (at 266). In *Drake Bakeries*, since the company had agreed to arbitrate the particular question it had to be held to that bargain. It is clear that the Mailers' Union has undertaken to arbitrate this issue. Both lower courts so held. The Association merely requests that, as in *Drake Bakeries*, the Union be held to its bargain and not allowed to take unilateral action effectively designed to negate its contractual commitments.

Drake Bakeries is in point for yet another reason. Justice White, for the Court, said that if the stay were denied only the no-strike clause would be enforced whereas granting the stay would enforce both the no-strike and the arbitration

clauses. The Court found the latter alternative preferable (at 264). To affirm the Circuit Court in this case would constitute only enforcement of the arbitration clause of this agreement. The covenant to maintain the status quo would be ignored. On the other hand, the granting of the stay would enforce both the arbitration and status quo provisions. The Association contends that this result is preferable for the same three reasons given in *Drake Bakeries* (see 263). These parties outlined a settlement procedure. They considered one of its important aspects the mutual pledge to maintain existing conditions pending decision. This provision was intended to supplement the main promise to arbitrate. To deny it enforcement would (1) not enforce part of the collective contract; (2) undermine the parties' private settlement procedure and (3) refuse to place a necessary sanction behind the promise to arbitrate. Thus, the stay vacated by the Second Circuit should be restored because:

> "Under our federal labor policy . . . we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this" (*Drake Bakeries*, at 263-264).

CONCLUSION

It is submitted that the judgment of the Court of Appeals, insofar as it reverses the order of the district court granting a stay of Union disciplinary proceedings pending arbitration, be reversed and the order of the district court reinstated.

Respectfully submitted,

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Dated: January 16, 1964

APPENDIX

SECTIONS 4 AND 7, NORRIS-LAGUARDIA ACT

"SEC. 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

"(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

"(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

"(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

"(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

"(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

"(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

"(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

"(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

"(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70, 29 U. S. C. § 104."

• • • • •

"SEC. 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

"(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

"(b) That substantial and irreparable injury to complainant's property will follow;

"(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial

of relief than will be inflicted upon defendants by the granting of relief:

"(d) That complainant has no adequate remedy at law; and

"(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

"Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

"The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity. Mar. 23, 1932, c. 90, § 7, 47 Stat. 71, 29 U. S. C. § 107."

SECTION 301(a) OF THE TAFT-HARTLEY ACT

"SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

UNITED STATES ARBITRATION ACT

"§ 3. *Stay of proceedings where issue therein referable to arbitration*

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action

until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. July 30, 1947, c. 392, § 1, 61 Stat. 669."

"§ 4. *Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination*

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by law for the service of summons in the jurisdiction in which the proceeding is brought. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear

and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. July 30, 1947, c. 392, § 1, 61 Stat. 669."

"§ 6. *Application heard as motion*

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. July 30, 1947, c. 392, § 1, 61 Stat. 669."

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 384

PUBLISHERS' ASSOCIATION OF NEW YORK CITY (on behalf of its member, THE NEW YORK TIMES COMPANY), *Petitioner*,

v.

NEW YORK MAILERS' UNION NUMBER SIX, *Respondent*.

RESPONDENT'S SUGGESTION OF MOOTNESS

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The sole question presented by the petition for certiorari in this case, which this Court granted on November 12, 1963, is whether Section 7 of the Norris-LaGuardia Act applies to an order of the District Court staying certain internal union proceedings pending arbitration compelled by the Court. The sole relief which petitioner seeks from this Court is a judgment staying proceedings within respondent union against one of its members on a charge brought by another member. As is shown by the materials reprinted as Appendix hereto, the originals of which have been filed with the Clerk of this Court, "that charge has now

been withdrawn with prejudice" and the union proceedings have been "finally terminated with prejudice". Petitioners have therefore obtained the full relief sought in this Court and the cause is clearly moot. *Taylor* v. *McElroy*, 360 U.S. 709, 711. However, since we are advised that petitioner will contend that the case is not moot, we shall state the reasons underlying this Suggestion in detail.

A. This case grows out of charges by James Kelly, a member of respondent union against another member, Everett Rowan, who was also foreman at the New York Times, which is a member of petitioner Publishers' Association. Following appropriate and established preliminary procedures, the union summoned Rowan to a hearing for the limited purpose of investigating the charge. (R. 15).*

In the meantime, on August 31, the employer had submitted a grievance in writing (R. 16) protesting against union's "notification * * * to * * * Rowan * * * of the charges filed against him." Calling attention to the contract's prohibition of union discipline against a foreman-member, and asserting that the charge "relate to the execution of Mr. Rowan's supervisory duties" the employer claimed a contract violation in the mere notice of charge and demanded its retraction, on pain of pressing the grievance to arbitration, and meanwhile "that no further action be taken by the Union to hear charges against, or to discipline this foreman". The union rejected this grievance.

Petitioner then brought this suit in the United States District Court for the Southern District of New

* "R." refers to the Transcript of Record in this Court.

York and sought two forms of relief: (1) an order directing defendant to arbitrate the grievance, and (2) an order directing that the union be restrained from proceeding further with the proposed hearing of charges against said foreman Everett Rowan *pending the determination of the arbitration.* (R. 10). On November 20, 1962 the District Court (Murphy, J.) granted the full relief prayed (R. 2-3).

The union thereupon appealed to the Court of Appeals. On May 20, 1963 that Court entered a judgment (1) affirming that part of the District Court's order which compelled arbitration and (2) reversing that part of the District Court's order which stayed the union's action on the Kelly charge pending arbitration. The union did not seek further review of the order compelling arbitration. But the Publishers' Association petitioned for certiorari to review such part of the Court of Appeals' order as was adverse to it, namely, that part of the order reversing the stay which the District Court had granted. On November 12, 1963 this Court granted certiorari, 375 U.S. 901 (R. 56).

On February 4, 1964 James Kelly, the member who had brought the charge, unequivocably withdrew it in a letter to respondent's President Laura which is reprinted in the Appendix hereto. Thereupon, President Laura executed an affidavit (also reprinted in the Appendix) that Laura "as duly authorized President, [has] notified member Rowan of such withdrawal of the Kelly charge, and [has] dissolved the investigating committee appointed by [him] under the Constitution and By-laws on September 9, 1962 to investigate said charges; and [he] thereupon caused such and all further proceedings to be finally terminated with pre-ju-

dice." The affidavit continues: "Member Kelly having assured the Union that he will initiate no further proceedings against member Rowan in connection with or growing out of the alleged incidents of August 12, 1962, and that he will make no grievance thereon under the collective bargaining agreement, the Union will entertain and take no further proceedings of any kind whatever against member Rowan or the publisher in behalf of member Kelly in that connection."

B. This is not a case in which the government is seeking an injunctive order whose effect would be to prevent unlawful practices in the future. *Labor Board* v. *Mexica Textile Mills*, 339 U.S. 563; cf. *United States* v. *W. T. Grant*, 345 U.S. 629, 632. Petitioner has not contended that the processing of the charges against Rowan would have been unlawful or could have been permanently enjoined. To "preserve the status quo pending the arbitration in accordance with the provisions of the contract, and to prevent frustration of its contention that the foreman must not be subjected to Union disciplinary proceedings before that contention could be considered in arbitration, the Association sought and obtained from the District Court a stay of Union proceedings against the foreman until the arbitration". (Cert. Pet., p. 3). Since these charges have now been withdrawn, the arbitration which was ordered by the courts below can now continue without any interference, real or imaginary, which the processing of those charges might have created. There is simply no subject matter in controversy between the parties in this Court. Petitioner "has obtained everything that it could recover in this case by a judgment of this court in its favor. The duty of this court, as of every judicial tribunal, is limited to determining rights

of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *California* v. *San Pablo & Tulare R. Co.*, 149 U.S. 308, 314.

The sole remaining question therefore is what order would be appropriate. An order could be entered vacating the judgments of both courts below and directing the District Court to enter a new order granting arbitration and dismissing the application for a stay on grounds of mootness. The same result would be achieved, and we think more cleanly, by an order vacating the grant of certiorari and denying certiorari. This is the course followed in *Labor Board* v. *Textile Workers' Union*, 352 U.S. 864. In that case, as this Court subsequently observed, "intervening circumstances . . . at least indicated that the litigation had become less meaningful to the parties . . .". *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 491, n. 16. The "intervening circumstances" here have left the present controversy much less alive than those in *Textile Workers* where there remained, at least in theory, an outstanding Labor Board order of which enforcement was sought. Moreover, even if this Court were empowered to hear moot cases and were to consider this case on the merits, it would be compelled to set aside the District Court's stay of the union proceedings since there is no subject matter on which an in-

junction may operate. Thus the case is no longer a proper vehicle for consideration of the question raised by the petition. Cf. *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180; *Rice* v. *Sioux City Memorial Park*, 349 U.S. 70. While this procedure seems to us to be preferable under the circumstances, respondent would have no objection to an order vacating the judgments below.

Respectfully submitted,

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295 Madison Avenue
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1730 K Street N.W.
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APPENDIX

February 4, 1964

New York Mailers' Union No. 6
One Beekman Street
New York 38, N. Y.

Att: Mr. Thomas M. Laura, President

Dear President Laura:

This will confirm that I have withdrawn with prejudice my written and sworn charge, dated August 20, 1962, against member Everett Rowan, foreman of The New York Times mailroom, for alleged violation of Article III, Section 1 of the Union Constitution; and I shall not make any further accusation or charge against member Rowan on the basis of the facts presented to you in writing with that charge, connected with or growing out of the incidents of August 12, 1962, as described therein.

Accordingly, I request the Union to cease any further processing of my charge and to terminate all proceedings against member Rowan in connection therewith. Moreover, I shall not make any grievance against member Rowan under the collective bargaining agreement with the Publishers in connection with those incidents.

Fraternally yours,

JAMES KELLY
James Kelly.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

THOMAS M. LAURA, being duly sworn, deposes and says:

That he is the President of New York Mailers' Union No. 6, International Typographical Union, AFL-CIO.

By written confirmation dated February 4, 1964, attached hereto, member James Kelly, having duly withdrawn with prejudice his sworn charge, dated August 20, 1962, against member Everett Rowan, foreman of The New York Times mailroom, for alleged violations of Article III, Section 1 of the Union Constitution, and having requested the Union to drop all further proceedings thereon against member Rowan, I, as duly authorized President, have notified member Rowan of such withdrawal of the Kelly charge, and have dissolved the investigating committee appointed by me under the Constitution and By-Laws on September 9, 1962 to investigate said charges; and I thereupon caused such and all further proceedings to be finally terminated with prejudice.

Member Kelly having assured the Union that he will initiate no further proceedings against member Rowan in connection with or growing out of the alleged incidents of August 12, 1962, and that he will make no grievance thereon under the collective bargaining agreement, the Union will entertain and take no further proceedings of any kind whatever against member Rowan or the publisher in behalf of member Kelly in that connection.

THOMAS M. LAURA
Thomas M. Laura

Sworn to before me this 4th day of February, 1964.

HAROLD L. KRAININ

HAROLD L. KRAININ
Notary Public, State of New York
No. 30-7351150 Qual. in Nassau County
Cert. Filed in New York County
Commission Expires March 30, 1964

SUPREME COURT U. S.

Office Supreme Court, U.S.
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BRIEF IN OPPOSITION TO RESPONDENT'S SUGGESTION OF MOOTNESS

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BRIEF IN OPPOSITION TO RESPONDENT'S SUGGESTION OF MOOTNESS

Introduction

Contrary to the assertions in Respondent's Suggestion of Mootness (p. 2), petitioner has not obtained, by virtue of the "materials" printed in the Appendix thereto, the full relief which it sought in this Court and in the action brought in the district court. Respondent has posed a narrow and incomplete description of the relief sought by petitioner in order to make the contention that its belated and unilateral action has made the issue moot.

Petitioner is not seeking only to prevent the Union from actually disciplining foreman Rowan on this particular charge. Petitioner wants a judicial declaration that, contrary to what the Second Circuit held, the status quo and no-discipline clauses of this labor contract are not made dead letters by Norris-LaGuardia; that the clauses have

meaning, and that in this situation, they mean that the Union cannot hold or threaten any disciplinary proceeding against foremen for acts done pursuant to management directives. In actual fact, the withdrawal does not grant petitioner any relief at all. Its only effect is to save Rowan from a penalty. The harm to petitioner's contractual right not to have its foremen disciplined by the union was done as soon as Rowan was threatened with disciplinary action. This harm is not undone by the union discontinuance. Therefore, this case is basically different from those cases* where a party seeking specified relief is conceded it on appeal.

In order to understand and appreciate petitioner's position with respect to respondent's latest maneuver, it is necessary to consider this case in its broader perspective. Petitioner and its members for some years have been plagued by harassment of their foremen through internal union disciplinary proceedings, particularly by the New York Typographical Union No. 6 (affiliated with respondent here in that both are subordinate locals of the International Typographical Union) and the unaffiliated Newspaper and Mail Deliverers' Union of New York and Vicinity. Under the contract with the Deliverers' Union, an Impartial Chairman with injunctive powers is constantly available to hear cases involving attempted union discipline of foremen and, as a result, resort to court has not been necessary with that union. On the other hand, under the

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* E.g., *Lewis Pub. Co.* v. *Wyman*, 228 U. S. 610 (1911) and *Taylor* v. *McElroy*, 360 U. S. 709 (1959). The latter, cited by respondent, actually supports petitioner's position. Taylor sought and, while the case was on appeal, gained "the ultimate relief which he demanded" (at 711), namely, his security clearance. This Court only declared the controversy moot after the Solicitor General had represented in open court that the evidence in the Government's files would not be used against Taylor again. (See *id.* at 711.) That removed the distinct, indeed dangerous, probability, present herein, that the incident would recur.

contracts with the Typographical and Mailers' Unions, arbitration is on an "ad hoc" basis and it frequently takes weeks or even months before an arbitrator can be selected and a grievance scheduled for hearing. In these circumstances, no arbitration remedy is available to prevent the unions from entertaining disciplinary proceedings against foremen, even though it is clear that the charges relate to the performance of management duties. The only recourse (where the employer is advised of the discipline*) was to seek to set aside the discipline by arbitration after the fact. While this course has some salutary effect on the morale of the foremen, the indignity of being subjected to such actions has a distinct demoralizing effect upon the foremen (See affidavit of C. Raymond Hulsart, R. 22-23).

In 1959, in a case involving discipline by the Typographical Union of an assistant foreman at the Long Island Daily Press, an arbitrator held the grievance of the publisher non-arbitrable because the General Laws of the ITU were involved and such laws, incorporated by reference in the contract, were not subject to arbitration. The Typographical Union thereafter took the position that its asserted right to discipline foremen under its laws was not subject to arbitration. However, during the pendency of the appeal to this Court from the order of the N. L. R. B. in *News Syndicate Co. Inc.*, 122 NLRB 818, rev'd 279 F. 2d 323, aff'd 365 U. S. 695 (1961) (wherein respondent argued that foremen were not subject to union discipline**), the actual visitation of discipline upon foremen by International Typographical Unions was substantially reduced.

However, in 1961, when the Typographical Union again entertained charges against a New York Times foreman,

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* Of course, not every foreman threatened or disciplined by the Union reports the fact to his employer.

** See Brief for Petitioner, p. 3, n. 1.

petitioner demanded arbitration and maintenance of the status quo. The union refused, contending the dispute was not arbitrable. Petitioner brought an action to compel arbitration including in its demand for relief a request for a stay of the union proceedings pending arbitration. That relief was granted by the district court (*Macneish* v. *N. Y. Typographical Union 6*, 205 F. Supp. 558 [S. D. N. Y. 1962]). Thus, the petitioner had achieved a judicially-sanctioned procedure and a remedy to protect foremen from union discipline pending the arbitration. It is to be emphasized that the stays granted by the district courts were based upon the contractual commitment of the parties to observe the status quo and the application of the usual equitable principles of irreparable injury, balancing of equities and absence of an adequate legal remedy.

This remedy was thereafter invoked successfully with regard to the attempted discipline of two other Typographical Union supervisors (*Publishers' Ass'n* v. *New York Typographical Union No. 6*, 62 Civ. 3024 [S. D. N. Y. 1962] [not officially reported]), and the Mailers' Union foreman in this case. The Typographical Union took appeals from the orders compelling arbitration and refused to proceed with the arbitrations pending the appeals. Those appeals have never been perfected and the arbitrations have not been held. However, that posture was acceptable to the publishers since the union was effectively restrained from proceeding with the discipline of the foremen. The Mailers' Union did perfect its appeal in this case and succeeded in vacating the stay on the basis of Norris-LaGuardia. Thus, the effective remedy procedure petitioner had only recently established was destroyed. Petitioner hopes to reestablish that practical protection of its foremen by a declaration from this Court.

In a case subsequent to the decision of the Court of Appeals in this case, petitioner moved to compel the Typo-

graphical Union to arbitrate its attempt to discipline a New York Journal-American foreman for his actions in securing machines on the night the 114-day strike was called by the Typographical Union. In view of the decision of the Court of Appeals, no request for a stay of the discipline was made. *Pock v. New York Typographical Union*, 225 F. Supp. 181 (S. D. N. Y. 1963). The disciplinary proceedings were concluded, the foreman was found guilty and fined and the Journal-American is relegated to the inadequate remedy of arbitration after the fact where the expected relief will be, at most, a declaration by the arbitrator that the Union should not have disciplined that foreman.

The effect of a determination of mootness in this case, even with a vacatur of the Court of Appeals judgment, would be to deny the publishers the opportunity to restore the practical remedy they only recently established for the protection of their foremen. The next time a union starts to discipline a foreman, an application by petitioner for a stay of proceedings will undoubtedly be denied by the District Court. The decision of the Court of Appeals in this case may be vacated but its reasoning will remain. It is axiomatic that no District Court in this Circuit will reach a result it knows its Court of Appeals is certain to overturn.

If a stay cannot be obtained in the first instance, the disciplining will proceed and be completed. A live issue could never be preserved for determination by higher courts. In sum, by withdrawing the charges against foreman Rowan at this late date, the Union may succeed in forever foreclosing petitioner from protecting its foremen from discipline. On the basis of the authorities cited below, we submit that this Court should not deprive petitioner of a hearing on the merits.

I

This case is not moot because there remains a continuing controversy between adverse parties over an existing subject matter.

Respondent asks this Court to conclude that its withdrawal of charges against Everett Rowan has made this action "moot". Therefore, it is not inappropriate to look at the classic definition of "mootness":

> "[A] moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." [*Ex parte Steele*, 162 Fed. 694, 701 (N. D. Ala. 1908); see also Black, *Law Dictionary* (4th ed. 1951), at 1159.]

Petitioner submits that, notwithstanding the Union's attempt to escape from this case, a real, viable controversy remains and that a judgment of this Court would have a practical legal effect, indeed a dispositive one, on this existing dispute.

The essence of the concept of mootness is that, as there no longer exist adverse parties and sufficient legal issues to maintain the litigation, any decree will be a futile exercise. See 6 Moore, *Federal Practice* ¶57.13, at 3074 (2d ed. 1953). Petitioner will demonstrate that there still remain before the bar of this Court adverse litigants against whom the Court may enforce its decision, cf. *Eisler* v. *U. S.*, 338 U. S. 189, 192 (1949) (dissenting opinion), and an actual sub-

sisting controversy, see *U. S. v. W. T. Grant Co.*, 345 U. S. 629, 632 (1953), which has not been settled by the Union's tactic and will not be settled without a decision from this Court. *See* Note, *Cases Moot on Appeal*, 103 U. Pa. L. Rev. 772, 783 (1955). Consequently, there is a subject matter in controversy between these parties "on which the judgment of the court can operate." *Walling v. Helmerich & Payne, Inc.*, 323 U. S. 37, 43 (1944).

In essence, the ruling of the Second Circuit was that Section 34 of the labor contract between these parties* is unenforceable due to Norris-LaGuardia. The Union does not now and never has retreated from its position that this is a correct statement of the law as applied to this litigation. (See para. 2, Answer, R. 25.) Petitioner has consistently asserted that the processing of charges against this or any other management representative, without more, is a violation of Section 20-*c* of this contract.** (See para. 14 of complaint, R. 9, and affidavit of C. Raymond Hulsart, at R. 21.) Respondent continues to dispute this position (Resp. Sugg., p. 4). It matters very little that the arbitra-

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* "Section 34. It is agreed that fruitless controversies must be avoided and every effort made to maintain harmonious relations. To accomplish this, both parties will in every instance give prompt attention to disputes and will in good faith endeavor to settle all differences by conciliation between the Chapel Chairman and the Foreman, or, if necessary, between the officials of the Union and the employer. In the event that a decision is not reached by conciliation then the difference may be referred to the Joint Standing Committee as herein provided. Pending decision (in all except discharge cases) conditions existing prior to the dispute shall be maintained. However, no condition which has existed for thirty (30) days prior to a complaint in writing shall be changed, pending the decision of the Joint Standing Committee." (R. 8).

** "Section 20-c. The Union shall not discipline the Foreman for carrying out the instructions of the Publisher or his representative" (R. 6).

tion can now "continue without any interference, real or imaginary" (Resp. Sugg., p. 4) now that the Union has discontinued what it had no right to begin. Surely, the arbitration may proceed to a conclusion but any determination that the Union did indeed violate this contract by entertaining charges against Rowan could not undo the harm already done. There is a very definite and acute controversy here.

II

Where there is a probability that the party causing the mootness will resume the challenged activities, the case still presents a justiciable issue.

This Court has repeatedly said that where there is a likelihood that the acts complained of will be repeated, the issues remain justiciable and it can proceed to render a judgment defining the rights and obligations of the parties. 6 Moore, *Federal Practice* ¶57.13, at 3075 (2d ed. 1953); *So. Pacific Terminal Co.* v. *ICC*, 219 U. S. 498 (1911) and *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). Petitioner need only show that the original factual situation is likely to be replaced on its expiration by another which is substantially identical and which will continue to affect the substantive rights of the parties in the same manner. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 146 (1946), or to use this Court's own formulation:

> "The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

Respondent's consistent behavior both before and during this litigation certainly indicates that the factual situation will recur.*

This case is not an isolated incident. It is only one of many attempts this Union has made to intimidate management representatives by threatening or instituting disciplinary proceedings. The Union's own statistics show that in the decade from 1953-1962, forty-seven discipline cases concerning Mailers' foremen went to trial (R. 40). This total, the Union admits (R. 39), does not include the "more voluminous" charges or threats of charges that never reached the trial stage. Nor does it include the charges and threats of its big sister, Typographical Union No. 6. It is particularly revealing that, during this same period, foremen, who only constitute about 5% of the total Mailers' Union membership, were involved in 40.2% of these discipline trials. This disproportionate number of foremen discipline cases certainly bears witness to the existence of a calculated harassment campaign. These attempts continue to the present day. Since the Union has never promised to discontinue this harassment program, there is much more than a strong probability that they will continue until a court declares that Sections 20-c and 34 of this contract can be judicially enforced.

So. Pacific Terminal Co. v. *ICC*, 219 U. S. 498 (1911), is instructive. After certiorari was granted, defendant's objectional order expired as anticipated by defendant. This Court found that the defendant could, and in all likelihood

* Though many of the cases invoking this repetition exception to mootness involve governmental agencies, the exception is not limited to regulatory orders alone. Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 136-138 (1945); see, e.g., *Securities & Exchange Comm.* v. *Okin*, 132 F. 2d 784 (2d Cir. 1943), and *Papaliolios* v. *Durning*, 175 F. 2d 73 (2d Cir. 1949).

would, re-issue the controverted order. Consequently, it ignored a suggestion of mootness because to do otherwise would allow defendant to prevent plaintiff from asserting potentially legitimate rights and ever gain adequate judicial redress. *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (4th Cir. 1943), involved a similar technique. The Fourth Circuit reached the same result because (at 105):

> "The admitted likelihood of Haile's resuming operations as soon as the ban . . . has been lifted clearly indicates that a genuine and substantial controversy exists between the parties. The possibility of future violations . . . is very much with us and not merely within the realm of prophecy."

The above applies with greater force to the instant case where the Union has decided it would be prudent to discontinue one attempt to browbeat one foreman and, at the same time, remain free to continue their general campaign of vexation.

The burden is on respondent to show that this case has become moot. As soon as petitioner demonstrates the danger that this wrong will be repeated, this "heavy burden" shifts to the Union. *U. S.* v. *W. T. Grant Co.*, 345 U. S. 629, 633 (1953). They must disprove the existence of this danger. This is because "courts do not favor the powerful weapon of mootness" (*Id.*, at 633).

In this case, the pattern of repeated contract violations that have continued to the present shows either that the Union does not regard the status quo or no-discipline clauses as binding or, in the alternative, will deliberately and consistently violate them until stopped. The Union's conduct prior to as well as during this litigation does not inspire confidence in its treatment of petitioner's rights free from the sanction of a definitive judicial declaration

of rights and liabilities. Despite the clear language of Section 20-c, this Union has never conceded that they had no right to discipline or consider disciplinary charges against management representatives.*

Now that this case is about to be heard on the merits, respondent files a Suggestion of Mootness based upon two pieces of paper that are more significant for what they omit. Kelly, in a communication to his union president, withdfaws the charge he made concerning incidents in August, 1962 and says he will not make another charge in connection with those incidents. He does *not* say that he will not again file charges the next time foreman Rowan gives him an order or criticizes his work. President Laura, in his affidavit, states that he has dissolved the proceedings initiated by Kelly. He does *not* say that the Union will henceforth honor its contractual obligation not to discipline foremen, or that he will not take cognizance of charges against foremen arising out of the performance of their management duties, or that he will honor the demand of the petitioner that the status quo be observed in future foreman discipline cases. In fact, the dismissal with prejudice of the charges against Rowan does not even create an obligation running to and enforcible by this petitioner. Subsequent court action would be necessary and, just as here, that would only serve to close the barn door after the horse had escaped.

What the Union has in effect done is to cease activity it had no right to commence in the first instance. It merely abandoned prohibited activity after it had accomplished its objective. In short, the Union is attempting to escape a sinking ship in dread of losing this case on the merits. Cf. *U. S.* v. *U. S. Steel Corp.*, 251 U. S. 417, 445 (1920).

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* The Union has always contended they have this right since the foremen are union members. See letter of Union president, Laura, R. 17-18 and his affidavit R. 43.

The discontinuance of illegal conduct under the threat of litigation does not make a case moot. See, e.g., *U. S. v. W. T. Grant Co., supra*, at 632 (1953). Justice Murphy, speaking for the Court in *Walling* v. *Helmerich & Payne*, 323 U. S. 37 (1944), summarized this exception to the mootness doctrine as follows (at 43):

> "Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. . . . Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus 'an actual controversy, and adverse interests,' . . . with a 'subject-matter on which the judgment of the court can operate'."

Otherwise, every defendant guilty of illegal or prohibited conduct could avoid complete judicial review by exactly the same escapist technique employed by this Union.

III

Where there is the danger that the defendant will resume prohibited conduct, the fact that the alleged mootness was caused solely by the action of defendant requires a finding of justiciability.

Mootness is a conclusionary word typifying a general judicial attitude. Judge Prettyman has recently clearly delineated this basic principle. In *Labor Youth League* v. *Subversive Activities Control Bd.*, 322 F. 2d 364 (D. C. Cir. 1963), he said (at 374):

> "mootness is not a fixed term of uniform factual content but is a variable from the factual standpoint, that it arises from different causes, and that the action

> required by justice varies from case to case depending on the circumstances."

This case does not have the classic elements of mootness. There are before the Court adverse parties, having definite legal interests in this outcome, who will present complete arguments (See Note, 103 U. Pa. L. Rev. 772, 796 (1955)). There is nothing fictional or collusive about this case. See *Gelpi* v. *Tugwell*, 123 F. 2d 377, 379 (1st Cir. 1941) (dissenting opinion).

If this case is moot, it is only because respondent alone has decided it should be. This alleged mootness occurred through no fault of petitioner. It is not surprising that this and other courts have refused to allow litigants to exert such unilateral control over the judicial process. See *Murphy* v. *Benson*, 270 F. 2d 419, 421 (2d Cir. 1959) cert. denied 362 U. S. 929 (1960) and *U. S.* v. *Oregon State Medical Soc.*, 343 U. S. 326, 333 (1952).

Respondent's Suggestion significantly omits *Mills* v. *Green*, 159 U. S. 651 (1895), the leading case on the subject of mootness. This omission becomes meaningful when one examines *Mills* closely. The Court said there (at 654) that a court would be deprived of jurisdiction if, due to "plaintiff's own act or [a] power beyond [the] control of either party", an event occurred which made any relief impossible. In *Mills*, the defendant argued mootness. The Court upheld his argument because the event causing the mootness had been brought on "without the fault of defendant" (*Id.*, at 654). In short, *Mills* suggests that a defendant cannot claim mootness where any want of an actual controversy is caused solely by his own acts. This Court has endorsed this sound rule since that time. See, e.g., *U. S.* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466, 477 (1916), and *So. Pacific Terminal Co.*, *supra*, at 514.

IV

The inevitability that labor contracts, projects and proceedings of limited duration will be completed before appellate consideration is possible makes their factual mootness an inappropriate consideration.

Many problems, by their nature, have no present factual foundation by the time they reach upper judicial levels. Such cases frequently involve construction projects. Inevitably, the projects are completed long before the dispute progresses very far up the judicial ladder. However, this does not deter the courts from defining the rights and obligations of the parties. See *Mitchell v. S. W. Engineering Co.*, 271 F. 2d 427 (8th Cir. 1959), and *Goldberg* v. *Wade Lahar Constr. Co.*, 290 F. 2d 408 (8th Cir.) cert. denied 368 U. S. 902 (1961). These courts emphasized that the offending party continued in the construction business and proceeded to decide the case even though the particular project out of which the dispute arose had been completed.

It is in the nature of disciplinary proceedings that the actual dispute will, in all probability, be concluded before appellate review. This will occur if the disciplinary proceedings are prosecuted to a conclusion. That would certainly have taken place here if these proceedings had followed their normal course since almost two years have elapsed since they began. This can also happen if the parties agree to arbitrate and the arbitration is concluded before the case reaches an appellate court. In fact, the instant case is very unusual in that the proceedings have remained viable for such a long time. This has occurred only because (1) the Union refused to arbitrate until after the Second Circuit opinion, and (2) the Union agreed at the time of the Second Circuit opinion to withhold further action until after this Court's determination.

The same situation was before this Court in *Teamsters* v. *Yellow Transit*, 370 U. S. 711 (1962). The District Court had issued an injunction against picketing. This injunction was to expire when the labor contract expired. As could be expected, the labor contract, and, therefore, the injunction, expired a few weeks after this Court granted certiorari. As here, respondent there suggested mootness (see Brief for Respondent, pp. 31-33, also App. B) about a month after petitioner had filed its main brief. The controversy was, as here, over the availability, despite Norris-LaGuardia, of a labor injunction. Therefore, *Yellow Transit* presented exactly this situation. In fact, *Yellow Transit* presented a stronger case for the application of the mootness doctrine of *Mills* v. *Green* since the injunction had expired by its own terms and not by the act of any party. Nevertheless, this Court did not adopt respondent's suggestion of mootness. Instead, it reversed the Tenth Circuit on the merits.

It is rare that such fact situations are preserved for judicial scrutiny. The recent case of *Motor Coach Employees* v. *Greyhound Lines*, —— F. Supp. ——, 55 L. R. R. M. 2078 (D. C. D. C. December 18, 1963), indicates this inherent problem. Greyhound announced on October 31, 1963 that they would move their Washington maintenance department to Chicago as of January 6, 1964. The union requested arbitration but the case could not be heard before the proposed moving date. The union sought a preliminary injunction restraining the company from moving pending the completion of arbitration. In an opinion using many of the arguments petitioner used in its main brief in this case, Judge Holtzoff held Norris-LaGuardia inapplicable and granted the injunction. If Judge Holtzoff had not been a perceptive reader of *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957) and had denied the injunction, the move would have taken place and the issue

would have become technically moot long before it reached any appellate court. Similarly, even with the injunction, the arbitration will, in all probability, be concluded before any appellate court could hear Greyhound's appeal. The lesson of *Greyhound* and *Yellow Transit* is that potential mootness is inherent in situations like the present. If respondent's contention is upheld, judicial review will be effectively denied to all problems in this area.

V

If this question is moot, the precedents of this court leave no doubt that both judgments below must be vacated and costs assessed against respondent.

Respondent devotes some space to the remedy applicable if this Court should adopt its suggestion of mootness. We will not discuss at length respondent's observation (Resp. Sugg., p. 5) that a vacation of both lower court judgments produces the "same result" as vacating the grant of certiorari and leaving the Second Circuit opinion standing. This does not merit extended discussion.*

The shortest answer to respondent is found in this Court's own language in *U. S.* v. *Munsingwear, Inc.*, 340 U. S. 36, 39 (1950):

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our

* The accepted disposition of mooted cases is meant to wipe out the *res judicata* effect of the judgment below. See *Henriques* v. *Gulf Oil Corp.*, 305 F. 2d 51 (10th Cir. 1962) and *Colpo* v. *Highway Truck Drivers*, 305 F. 2d 362 (3d Cir.) cert. denied 371 U. S. 890 (1962). Respondent's second alternative would be the same disposition of the case but a radically different disposition of the issues.

decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."

Accord: Stern & Gressman, *Supreme Court Practice*, 438 (3rd ed. 1962), and Robertson and Kirkham, *Jurisdiction of the Supreme Court* ¶273 at 498-500 (Wolfson and Kurland's ed. 1951).

Finally, it is settled that where one party causes the mootness, that party must pay costs. *Heitmuller* v. *Stokes*, 256 U. S. 359 (1921). See Note, 103 U. Pa. L. Rev. 772, 794-95 (1955).

CONCLUSION

Petitioner asks that this Court reject respondent's suggestion of mootness and dispose of this case on the merits as it did with *Teamsters* v. *Yellow Transit*, 370 U. S. 711 (1962).

Respectfully submitted,

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Dated: February 18, 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 324

PUBLISHERS' ASSOCIATION OF NEW YORK CITY
(on behalf of its member, The New York Times Company),
Petitioner,

against

NEW YORK MAILERS' UNION NUMBER SIX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 384

PUBLISHERS' ASSOCIATION OF NEW YORK CITY,
(on behalf of its member, The New York Times Company),
Petitioner,

against

NEW YORK MAILERS' UNION NUMBER SIX,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (R. 48-54) is reported at 317 F. 2d 624. The opinion of the United States District Court for the Southern District of New York (R. 3-4) is only unofficially reported, at 52 LRRM 2101 and at 46 LC Par. 17,968.

Jurisdiction

The judgment of the Court of Appeals (R. 55) was filed May 20, 1963, reversing in part the order of the District Court (R. 2-3) entered November 20, 1962. The

petition herein for a writ of certiorari was filed August 17, 1963, and was granted (R. 5-6) on November 12, 1963, 375 U. S. 901.

Statutes Involved

The statutes involved and appended hereto are, in relevant parts, Norris-LaGuardia Anti-Injunction Act (47 Stat. 70, 29 USC 101), Sections 1-4, 7, 9, and 13; Labor Management Relations Act, 1947, as Amended, popularly known as "Taft-Hartley" (61 Stat. 136, 29 USC 141), Sections 7, 8(a)(1) and (2), 8(b)(1), 14(a), and 301(a); Labor-Management Reporting and Disclosure Act of 1959, popularly known as "Landrum-Griffin" (73 Stat. 522, 29 USC 411), Sections 101(a) and (b); and United States Arbitration Act (61 Stat. 669, 9 USC 1), Section 3.

Questions Presented

1. Whether or not[1] the conduct of internal union proceedings, pursuant to constitution and by-laws, investigating one member's charge against another looking toward the latter's possible discipline by the union, falls within the scope of Norris-LaGuardia Sec. 4(b) acts not to be prohibited in a labor dispute between the union and the employer of those members concerning such proceedings;

2. Whether or not, in a labor dispute within the meaning of Norris-LaGuardia Sec. 13, the District Court, upon

1. This vital jurisdictional question, marked for reservation here in the footnote on p. 2 of respondent's Brief opposing certiorari, was pointedly presented and rejected in the courts below. The question of jurisdiction is ever alive. *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 588. Also see article by Judge Yankwich, Jurisdiction of Federal District Courts, 6 F.R.D. 507.

the employer's complaint, may enjoin the aforementioned union conduct without complying with the procedural requirements of Sec. 7 thereof.

[N.B. Petitioner's formulation begs the question as litigated below. Its premise that "the stay is based upon a 'status quo' provision" etc. is unsupported by any such Court findings, conclusions, or other stated reasons whatever for the injunction. The District Court reasoned and held no more than that the dispute was arbitrable (R. 25). Nonetheless, if petitioner's hypothesis is accepted by this Court, query whether a commitment to maintain *status quo ante* pending arbitration of a disputed change has any different legal significance in this context than an express no-strike promise.]

Counter-Statement of the Case

The Facts

Summarily, the material facts pleaded and shown without critical contest are as follows. The parties' collective agreement (R. 6-8, 11) requires the employer's foreman to be a member of the union, but provides that the union shall not discipline him, as a member, for carrying out employer's instructions. Moreover, subtended to express no-strike assurances, the agreement commits all disputes, broadly described but with stated exceptions, to ultimate determination by arbitration, pending which the *status quo ante* is to be maintained.[2] Among the relevant excep-

2. Petitioner's argumentative footnote 2 at p. 4 of its Brief proves too much and concedes too little. Its "vulnerability" to "unwarranted union demands" and "work stoppages", because "its product is extremely perishable" (cf. *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254), is fortified against, if at all, rather by the union's independent and unconditional no-strike commitment, to which the

tions are "the creation or operation of any rules not in conflict with * * * this contract, of any chapel or of the Union * * * for the conduct of its or their own affairs"; "local union laws not affecting * * * working conditions and the General Laws of the International Typographical Union"; and "the fundamental rights reserved by and to both parties".

On August 20, 1962, one Kelly, a union member, duly filed with it a written sworn charge (R. 12-13) against one Rowan, a fellow-member and a foreman, accusing the latter of violating a specified provision of the union's constitution by reason of alleged facts surrounding Rowan's one-week suspension of Kelly from his job. In accordance with union's prescribed mandatory procedure (R. 27-35), copy of the charge was duly served August 21 on Rowan (R. 14); on August 24 the latter filed an answer to the charge on its merits (R. 47); the union membership body on September 9, 1962, after debate, voted that the charge was "cognizable", i.e., stated a case on its face; whereupon an investigating committee was appointed to consider and report to the union membership whether or not there was *prima facie* proof of Rowan's violation as charged, sufficient to warrant a trial on the merits (R. 37-38); and the committee thereupon duly summoned Rowan to a hearing for said limited purposes of inquiry on September 24, 1962 (R. 15).

---

arbitration-*status quo* mechanism is explicitly stated to be the effective implementation. The contract, in full text before the District Court but excerpted for the record here, thus reads as follows, in the third literary paragraph of Sec. 24:

> "It is the intention and the desire of the parties hereto that no strike or other interruption of normal employment or production shall occur during the life of this agreement. To this end the Union and the Publishers commit themselves to the orderly settlement of disputes as provided herein."

In the meantime, on August 31, employer had submitted a grievance in writing (R. 16) protesting against union's "notification * * * to * * * Rowan * * * of the charges filed against him". Calling attention to the contract's prohibition of union discipline against a foreman-member, and asserting that the charge "relate(d) to the execution of Mr. Rowan's supervisory duties", employer claimed a contract violation in the mere notice of charge and demanded its retraction, on pain of pressing the grievance to arbitration; and meanwhile "that no further action be taken by the Union to hear charges against, or to discipline this foreman."

In response, on September 13 union rejected employer's "purported grievance" and demands as "presumptuous and premature"; asserted that the union proceedings as such on Kelly's charge were of "no legitimate concern" under the contract, and that "(u)ntil and unless the Union * * * resolves the matter on its merits as between its members Kelly and Rowan so as to visit discipline upon the latter", the grievance must be treated as "officious intermeddling" in the Union's internal affairs (R. 17-18).

District Court Proceedings

Employer's action was commenced on September 24, 1962, by service of summons and complaint (R. 5-18), together with an order to show cause containing a restraining order (R. 18-19). As required by the terms thereof, the employer posted security routinely under F.R.C.P. Rule 65(c). The union's duly constituted investigating committee was thus enjoined from proceeding to investigate Kelly's charge against Rowan to enable it to report whether or not there is warrant to order a

trial, before another union body, of the issue so drawn between those two members.

The complaint and moving papers purported to state a single cause of action for specific performance of the agreement to arbitrate, uncritically treating the injunctive restraint aspects of the prayer as but an ancillary stay of the very matter so referable to arbitration. The answer and opposition papers specifically and sharply raised the points brought to the Court of Appeals and now here under Norris-LaGuardia. Nevertheless, on submission of the case without a hearing, the District Court granted in full the relief sought in the complaint, on the sole dispositive authority[3] of *Macneish* v. *New York Typographical Union No. 6*, 205 F. Supp. 558 (S.D.N.Y.). It granted the "stay" without making any findings of fact or otherwise observing the procedures prescribed in Norris-La-Guardia Secs. 7 and 9, indeed without making any reference to that Act at all; moreover, without reference to or compliance with Rule 65(d), Federal Rules of Civil Procedure.

Court of Appeals Proceedings

On the union's appeal, the Court of Appeals affirmed the District Court decision to the extent that, under Taft-Hartley Sec. 301, it compelled arbitration of the employer-union dispute as to the alleged breach of their contract, but reversed it insofar as, despite Norris-LaGuardia, it

3. In *Macneish*, none whatever of the jurisdictional points relating to the injunction phase of our present case appear to have been raised, considered, passed upon, or decided there. The stay was granted therein *pro forma*, without findings or explication of any grounds on which it was based. Similarly, it does not appear that the District Court's simultaneous decision in the unrelated *Publishers'-Typographical Union* case referred to in its Opinion, and commented on in petitioner's Brief at f. 4 on p. 6, involved any question of jurisdiction to issue a prohibitory injunction.

enjoined the union's internal action in the Kelly-Rowan dispute. The reversal was grounded on Norris-LaGuardia Secs. 7 and 13 and this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U. S. 195.

The Court of Appeals held it "quite clear that the union's action on the Kelly charges both involves and grows out of a labor dispute" (R. 50). Erroneously, we believe, it held the union "to have failed to establish that the activities which have been enjoined are included in any of the categories of (Norris-LaGuardia) Section 4" (R. 51-2). But it concluded: "However, Section 7 of the Act covers activities which are not covered by Section 4. • • • Section 7 applies to injunctions in *any* cases involving or growing out of a labor dispute and prohibits the issuance of injunctions in all such cases, without regard to the nature of the activities against which the injunction is sought, unless certain procedural requirements are met and unless the court issuing the injunction makes certain findings. Not only have these requirements not been met in the present case but it would clearly be impossible for the court to make the required findings" (R. 51-3).

The Court of Appeals had posited the basic proposition in its opinion: "Absent Section 301 of • • • (Taft-Hartley), there could hardly be any question that the power of the court to enjoin a violation of a collective agreement would be limited by the Norris-LaGuardia Act. If the Court has power to enjoin the alleged violation in the present case it has that power only by virtue of the power to compel arbitration which is conferred by Section 301" (R. 50).

The Court below acknowledged the distinction that in *Sinclair* this Court had dealt with breach-of-contract strikes (concerning arbitrable grievance issues) clearly

within Norris-LaGuardia Sec. 4 (R. 51). Nevertheless, on the strength of the *Sinclair* reasoning and even *a fortiori*, it further concluded that neither the legislative history of Taft-Hartley Sec. 301 nor "reason or policy" could support the "subtlety" of an assumed repeal of Norris-LaGuardia Sec. 7 (R. 53). It pointed up the contrary's anomalous result that, while an employer "could not enjoin a strike or other Section 4 activity in violation of a collective agreement pending arbitration of the violation, he could enjoin any other type of violation. Ordinarily a strike would be far more disruptive of the contract relationship, and far more inimical to the statutory ideal of peaceful solution through the arbitration process than would the type of violation with which we are dealing in the present case • • • of a much less serious character" (R. 54).

Present Status of the Parties' Dispute[4]

Moot and academic questions involved

At no time since November 20, 1962, fifteen months ago when the District Court ordered arbitration, and despite the Court of Appeals' affirmance thereof on May 20, 1963, nine months ago, has petitioner moved the dispute to hearing and determination by that expeditious process of final resolution. At all times since May 20, 1963, when freed by the Court of Appeals from the District Court's injunction, respondent, while urging petitioner without avail to proceed to arbitration, voluntarily refrained as a courtesy but did *not* agree to refrain, as requested, from proceeding with the disputed internal union action on the pending Kelly-Rowan charge.

4. We inform the Court of the facts and our views herein solely in the interest of judicial administration, and make no further point of them.

Moreover, as laid before this Court by separate pending Suggestion of Mootness, that charge has been withdrawn with prejudice and the union has dissolved the Investigating Committee and terminated all proceedings on the charge. Cf. this Court's holding of mootness "(i)nsofar as the grievances sought restoration of workloads and job assignments", followed by employer's termination of mill operations. *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 459.

As we called to this Court's attention in respondent's Brief opposing certiorari, at pp. 3-4, "* * * petitioner's espousal of the cause of arbitration seems more academic than real". We questioned "its plea of right to injunctive relief 'ancillary' to an arbitration which inexplicably[5] it has stalled for almost one year", now fifteen months. We suggested, "The injunction would seem to be the end in itself to be desired, else it is doubtful that an actual, justiciable controversy exists at all."

Obviously, activation and conclusion of the arbitration, whatever its outcome, would similarly moot the case here. The issues brought here for determination on such borrowed time, and in face of the late resolution of the underlying dispute, could hardly be contrived to confront this Court with the onus of indulging in a more patent exercise of giving "opinions upon moot questions or abstract propositions, or of (declaring) principles or rules of law which cannot affect the matter in issue in the case before it." *Mills* v. *Green*, 159 U. S. 561; *Local No. 8-6, Oil, Chem. and Atom. Wkrs.* v. *Missouri*, 361 U. S. 363.

5. Unless, of course, petitioner should accept the dilemma of its having either (1) no actual interest in the substantive merits of the dispute to be arbitrated or (2) a fear of proceeding lest the "ancillary" stay issue be mooted.

Summary of Argument

I. The union acts complained of and prohibited[6] by the District Court injunction, being lawful, non-fraudulent, and peaceful self-regulatory proceedings mandated by union constitution and by-laws, in a controversy regularly and duly initiated thereunder by one of its members as against another, and involving and growing out of a labor dispute between and among employer, some of its employees, and union, were of a kind and character encompassed in Norris-LaGuardia Sec. 4(b) and, as such, were totally immune to reach by injunction at the employer's suit;

II. However the conduct may be categorized or descriptively generalized in Norris-LaGuardia Secs. 1-4, the union acts complained of, occurring as they did in a labor dispute, could not be prohibited by injunction, since this is a class of "case" comprehended in Sec. 7 thereof, and except in strict conformity with the prerequisites specified therein, irrespective of any otherwise actionable relief available under Taft-Hartley Sec. 301 as for breach of contract.

Counter-Argument: This *Is* a Labor Injunction

Not Merely Ancillary Stay Necessary to Effectuate Arbitration Order

Before developing these arguments at length, it would be well to address ourselves at once to petitioner's point

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6. Petitioner's main line of argument for a mandatory Sec. 301 decree commanding specific performance (à la *Lincoln Mills*) of the promise to maintain *status quo* rests on a false bottom of semantics, as if artfully to avoid the vice of a prohibitory injunction restraining change of status. We have not thought that *Sinclair* would have gone the other way if specific performance had been sought of an affirmative promise to work without interruption. Petitioner's posturing thesis seems to fancy such a devious judicial *tour de force*.

(III in its Brief) that somehow no labor injunction is involved at all in the "stay". In vindication of the Court's "inherent equity jurisdiction" to protect its own main order to arbitrate, petitioner would thus sweep Norris-LaGuardia under the carpet and out of sight. It cites and analyzes various cases and some legislative history to demonstrate the traditional distinction between injunctions and ancillary stays. In the main, we would not quarrel with the broad proposition or the leading supportive authorities cited that existing jurisdiction and orders in equity may be implemented with appropriate interlocutory, usually non-appealable directions, or with a denial of same, calculated incidentally to facilitate, regulate, and ensure the conduct of the principal proceedings and due execution of the ultimate mandates; or, in cases of "pendent jurisdiction", to avoid wasteful and burdensome relitigation of essentially the same issues.

As petitioner concedes (Brief, p. 18 second paragraph), indeed insists, the "request that the Union be compelled to arbitrate * * * was the principal relief sought". This Court held in *Goodall-Sanford* v. *United Textile Workers*, 353 U. S. 550, 551: "Arbitration is not merely a step in judicial enforcement of a claim or auxiliary to a main proceeding, but the full relief sought. A decree under Sec. 301(a) ordering enforcement of an arbitration provision in a collective bargaining agreement is, therefore, a 'final decision' * * *." Petitioner has long had that ultimate relief in this case, done nothing about it, but thinks the integrity of the District Court's decree to that effect, backed as it was with a "stay" in advance aid of execution, as it were, must still be upheld purely as an exercise of self-assertive power, *nunc pro tunc* and for all its gathering signs of futility.

Apart from that, the precise matter ordered to arbitration was the subsumed breach of Sec. 20-c of the contract, the promise not to discipline foreman Rowan. The Court's jurisdiction was invoked and the case lay, however, not because of or for relief from *that* alleged breach, but rather exclusively because of and to relieve from the entirely separate, disputed breach of the Sec. 33 a-d agreement to arbitrate. As an ostensible incident to such latter relief, petitioner prevailed upon the District Court to implement the order of arbitration as such, not with directive assurances of unreluctant submission to and successful exhaustion of that agreed process,[7] but with an unvarnished negative, prohibitory injunction (R. 3) restraining the various acts subsidiarily disputed as violative and, contrariwise, non-violative of Sec. 20-c. And that implementation is now sought to be justified under the guise of a valid "request for enforcement of the status quo clause (as) an appeal to that inherent equity jurisdiction which operates to ensure that judicial orders will not be meaningless" (Pet. Br., pp. 18-19).

But the "status quo clause" itself, separately expressed in Sec. 34 of the contract, was thus too a promissory commitment the alleged and denied breach of which was exclusively arbitrable under Sec. 33 a-d, just as a disputed

7. E.g., effectuation by Court appointment of an arbitrator if the proceeding should be frustrated by failure of parties to make a mutual selection. *Deaton Truck Line* v. *Local 612 Teamsters*, 307 F. 2d 748, rehearing denied 314 F. 2d 418 (C.A. 6); *Textile Workers Union* v. *American Thread Co.*, 113 F. Supp. 137, 142 (D.C. Mass.). Of course, stay of a parallel damage action at law between the same parties for the same cause, which in effect the parties have foreclosed to themselves by prior stipulation upon the arbitration tribunal, is standard procedure. *Drake Bakeries*, supra; *Arbitration Act*, Sec. 3. And, similarly, *Old Dutch Farms*, cited and argued from in petitioner's Brief at pp. 22-4, stands for no more than judicial intervention to assure exhaustion of the arbitration proceeding already commenced.

strike in spite of Sec. 24 would be. *Drake Bakeries*, supra. The status quo clause is neither self-executing, nor excluded from the arbitration ambit, nor enforceable but by way of an arbitration award. *Armstrong-Norwalk Rubber Corp.* v. *Local 283, Rubber Workers*, 167 F. Supp. 817, 819-20 (DC Conn.), appeal dismissed 269 F. 2d 618 (C.A. 2); *Fuller Co.* v. *Steelworkers*, 220 F. Supp. 896 (DC, E Pa.).

The "stay" is a bare injunction verbally in its terms and coercively in intended effect, truly as "permanent" as the prime order to arbitrate is a "final decision". Contrary to petitioner's repeated misconceptions urged below and upon this Court, the situation does not involve evasion of the arbitral process, pursuit of inconsistent remedies, or preemption of forums on the same or a substantially or determinatively related issue as between the same parties. The conduct enjoined is at most a private, internal, self-governing union investigatory proceeding to which petitioner is not party, upon an immediate issue among and between the union and certain of its members as such, to which proceeding petitioner is stranger and by any determination of which it could not possibly be bound, prejudiced, or even benefited.

The only issue "finally" decided in *this* case, on the other hand, was whether the union must perform its contractual obligation to arbitrate the underlying dispute raised by the employer's protest that the union's said internal proceeding breaches the Sec. 20-c promise not to "discipline" a foreman-member. Saved for the arbitrator, come the day if ever, will be the wholly different, residual issue as to whether or not that latter promise was so breached.

The so-called "stay" is an independent, plenary imposition of intrusive restraint which, but for the wrappings

of the attendant arbitration, we would all recognize at once to be an injunction in its crudest sense. Even in a Sec. 301 action to *enforce* a contested arbitration award, the Courts frankly recognize that a preliminary order of compliance therewith, to abide decision on enforcement, is an "injunction", without stylized equivocation in terms of ancillary powers attaching to pending jurisdiction. *Local 453, IUE* v. *Otis Elevator Co.*, 201 F. Supp. 213 (S.D.N.Y.); cf. *idem*, 314 F. 2d 25 (C.A. 2).

The indications otherwise, stressed by petitioner (Br. 20-1), in *Brotherhood of L.E.* v. *Missouri-Kansas-Texas R. Co.*, 363 U. S. 528, are clearly distinguishable and not in point. That involved an authorized action under the Railway Labor Act *for an injunction prohibiting a strike* pending the statutory Adjustment Board decision of the merits of the underlying dispute. The essential question which this Court narrowly decided, in the affirmative, was whether or not the Court below,[8] in granting that injunction, could attach thereto certain prior "conditions requiring preservation of the *status quo" by the suitor.* This Court held no more than that, "under traditional equitable principles," the issuance of the injunction might so be qualified as "the price of relief".

We now complete this phase of the counter-argument as to whether or not a "labor injunction" is before this Court at all, separate from the normal equity power to

8. In passing, it is worthy of note in that case (at pp. 533-4) that the District Judge had been "scrupulous to avoid encroaching upon the jurisdiction of the Board" as to the merits of the basic dispute. This deserves contrast with the District Judge's remarkable encroachment on the arbitrator's peculiar function in our case, at R. 4, fol. 5: "* * * Sec. 20-c prohibits the disciplining of plaintiff's foreman. Certainly [sic] this must include the filing of charges against him." By the latter remark on an issue close to the heart of the case to be decided only by an arbitrator, the Court thus prejudicially all but made the "law of the case".

"stay", merely ancillary to jurisdiction otherwise attached to related or derivative subject-matter. We do not anticipate that this Court would attenuate the rationale of *Sinclair*, in the line of of decisions developing Sec. 301 law while continuing to enforce Norris-LaGuardia, so as to permit a restraint prohibiting disputed labor activities when verbally coupled as a "stay" with jurisdiction to enforce their arbitration, while holding such restraint impermissible as an "injunction" by direct suit therefor. Cf. this Court's unanimity in *Chauffeurs etc., Local 795* v. *Yellow Transit Freight Lines*, 370 U. S. 711. We find no intimations in that direction in *Missouri-Kansas-Texas*, supra, or in the Court's reservation therein in f. 3 (363 U. S. at 531). And we assume that *Sinclair* would not have been decided otherwise than it was if the injunction against the srike had been sought ancillary to an order to arbitrate underlying disputes or even the strike itself as an alleged breach of contract subject to arbitration.

To the extent that *Local Division 1098, Amalgamated etc.* v. *Eastern Greyhound Lines* (DC, DC decided December 18, 1963—Holtzoff, D.J.), 48 LC Par. 18,667, may suggest the other way in the sole light of *Lincoln Mills*, in our view it is thoroughly unsound. In that case a preliminary injunction (a "stay" in petitioner's concept) was sought *in haec verba* pending an arbitration already privately initiated and scheduled without Court compulsion. Yet it enjoined an employer's disputed plant-removal (lockout?) acts on the sole, strained theory that "the action * * * is a form of an attempt to enforce specific performance of an arbitration clause because what it seeks to do is to protect and safeguard the situation in such a manner that the award, when and if made, will be effective and not futile". Indeed, shortly before, with-

out the talismanic arbitration prop, the same Court had denied the preliminary injunction on ordinary "equitable principles".[9] *Idem*, 48 LC Par. 18,666.

ARGUMENT

I

The injunction, in a labor dispute, prohibited Kelly and Rowan, and each and every other member of respondent-union from "becoming or remaining a member" thereof, within the meaning, intent, and application of Norris-LaGuardia Sec. 4(b).

A. *Basic jurisdictional question still reserved*

With due deference to Judge Hays, who wrote for the Court of Appeals holding that the Union had "failed to establish" a Sec. 4 case, we deeply believe and still urge that the acts prohibited are characteristically, instinctively, and inextricably within the meaningful scope of that category. Without benefit of any analysis in that Court's opinion as to the shortcoming of that among our chief contentions, we respectfully and, of course, disappointedly disagree with the Court's summary rejection of that point, even though, as we shall argue below, it detoured to reach

9. Although we should have thought Norris-LaGuardia a decisive obstacle, the disposition of the first motion does not indicate that it was raised or considered. The later motion, however, brought the question up. Again on the singular authority of *Lincoln Mills*, misapplied as we think, the Court held Norris-LaGuardia inapplicable. Although we shall develop our reasons for so thinking in the points following, for present purposes at this juncture we would emphasize that in *Eastern Greyhound* actual jurisdiction under Sec. 301 was never invested in the Court purportedly to remedy a breach of contract to arbitrate, for there was no refusal on demand to do so. The unofficial report does not disclose the basis of jurisdiction for an injunction action beyond the implication of Sec. 301.

the correct result by the alternate route of Sec. 7. As noted above, the District Court had totally ignored all Norris-LaGuardia considerations without a word of comment. Hence the Court of Appeals' categorical treatment of the Sec. 4(b) issue is [redacted] illuminated from below as by way of an implied affirmance or adoption of any reasoning of record at the lower level. Accordingly, we shall argue here *de novo* the essentials of our Sec. 4 points as developed and briefed to the Courts below.

It should be observed at the outset that, unlike the employer in *Sinclair*, petitioner does *not* contend that Taft-Hartley Sec. 301, via *Lincoln Mills*, removed the bar to injunctions in arbitrable disputes involving Sec. 4 acts. Rather, it explicitly (Br. 13) "agrees that the Anti-Injunction Act should be rigorously applied to a true Section 4 situation", accepting the doctrine of *Sinclair* as well as the earlier application precisely to Sec. 4(b), outside the arbitration setting, in *Sperry Gyroscope Co. v. Hall*, 185 F. Supp. 64 (S.D. N. Y.). Petitioner contents itself and offers this Court for light, however, not a whit more than its own snap Q.E.D. that the acts enjoined "were clearly not Section 4 activities". (Br. 8.) It there seeks to rest on what the "court below * * * found", which was far short of that pellucid clarity in the court holding that the union had "failed to establish" the nexus to Sec. 4.

In our view, the naked question here is unencumbered by the accidental dress of Taft-Hartley Sec. 301 in which it is discovered. The bar of power to enjoin must be tested strictly by the independent scope and content of the anti-injunction statute itself. The bar is not lowered by the fact that the acts sought to be enjoined may have occurred in the setting of an existing collective bargaining agreement covering them, or in otherwise actionable

breach thereof, or in disregard of orderly processes for settlement under an arbitration commitment. *Sinclair, supra; A. H. Bull Steamship Co.* v. *Seafarers' International Union, etc.*, 250 F. 2d 326 (C.A. 2), cert. denied 355 U. S. 932; *W. L. Mead, Inc.* v. *IBT*, 217 F. 2d 6 (C.A. 1). Removing, then, some of the earlier obfuscations of Taft-Hartley Sec. 301, we may approach the question of jurisdictional power in stark terms of whether or not the union's acts complained of could be enjoined *per se* at the instance of employer even if there were no collective agreement, and, of course, no breach thereof and no avoidance of an arbitration commitment.

Moreover, as we see it, the foremanship of union member Rowan is also accidental and indeed irrelevant to this precise question for the purposes of the case. Just as a specific commitment by the union not to discipline a foreman-member adds or subtracts nothing in terms of the Court's jurisdiction to enjoin the *act* of disciplining him, so it adds or subtracts nothing, as to jurisdiction to enjoin the discipline of Rowan *qua* union member, that he happens to be a foreman. Truly Sec. 20-c might as well have provided, for all it matters to this phase of the case, that the union would not discipline *any member*, not merely the foreman, for carrying out management's instructions. Similarly, it would not matter if there were no Sec. 20-c at all and the employer simply sought an injunction against union discipline of some foreman or other member because of some adverse effect which such union action would have, substantially and demonstrably if you will, upon the employer, as was held to be the arbitrable fact question in *Macneish*, where there was no specific equivalent to our contract's Sec. 20-c.

First, we should call attention that there is no issue in this case as to the existence of a requisite Sec. 13 "labor

dispute" in which the union is a "person participating or interested". The case comes here on that assumption from the pleadings and as held by the Court of Appeals, although without findings to that effect in the District Court except as implied in its taking jurisdiction under Taft-Hartley Sec. 301 to order arbitration.

B. *Sec. 4(b) not concerned with "yellow dog" contracts*

As one might expect, the pre-1932 occasions for the "abuse" of injunctions had arisen mainly in connection with strikes, boycotts, and picketing. However, for almost a century before enactment of Norris-LaGuardia, the common law had developed quite fully to the point of no longer regarding a union, without more, as a criminal conspiracy or otherwise unlawful combination *per se*, or the act of "becoming and remaining a member" thereof a wrongdoing. In 1932 there were *no* "modern" cases of injunction against union membership as such. However, "yellow dog" contract breach inducements, as torts, had brought a spate of injunctions in the preceding twenty years.[10]

We have found no legislative history, unfortunately, and no Court decisions other than *Sperry Gyroscope*, supra, in the thirty-two years since enactment, that would shed any light precisely as to what Congress may have had in mind to accomplish at the farthest reach of Sec. 4(b). We are told without qualification, "The kinds of acts which had given rise to abuse of the power to enjoin are listed in Sec. 4." (*Lincoln Mills*, p. 458.) Thus we are led to inquire, in the blurred history of contemporary problems, as to why particularly subsec. (b), both in substance and in the form of its phrasing, was deliberately written into

10. Notably, *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229.

Norris-LaGuardia Sec. 4, and as to what covered conduct may have been intended thus to be protected from injunction abuse.[11]

Pretty obviously, subsec. (b) was not put there *because of* "yellow dog" contracts. Nor was there any current or foreseeable problem of injunctions baldly forbidding union membership without more. The then unrestricted power of employers to fire must have been far more efficacious. Then prevalent injunctions against "stranger" enticement of employees to violate "yellow dog" contracts were palpably not met in any construction of the Sec. 4(b) language. Not even suggestively did it touch the acts of such "tortfeasors".

Besides, whatever problems inhered in and grew out of "yellow dog" contracts were quite effectively and even more thoroughly taken care of, specifically and exclusively, in Sec. 3 of the Act outlawing such contracts, denying them enforceability, and allowing them "no basis for the granting of legal or equitable relief". In *Sperry Gyroscope*, supra, District Judge Herlands, as far as he had to go, correctly observed: "There is no ground and no authority for limiting Section 104(b) to 'yellow dog' contracts * * *. By its terms, it embraces more than such contracts. Even Section 103, to which it refers, deals with other kinds of restrictive contracts."

C. *Sec. 4(b) concerns privilege of individual choice and internal group control of union membership*

In light of all these considerations, we approach Sec. 4(b) in its own terms. It peremptorily withdraws juris-

11. Of the nine listed "acts" in Sec. 4, this was the only brand new one of substance added to the former list contained since 1914 in Sec. 20 of the Clayton Act (38 Stat. 738; 29 USC 52) and carried over without substantial change, after disenchantment otherwise, into the superseding Norris-LaGuardia Act in 1932.

diction of the Court "to prohibit any person * * * from doing, whether singly or *in concert* (emphasis supplied) any of the following acts: * * * (b) Becoming or remaining a member of any labor organization * * *." At once we are impressed that such "act", when done by persons *in concert*, must sensibly contemplate more than individual conduct by personal choice of being a union man or not, and must be construed to reach group activities in self-association and self-organization, including the essential act of self-governance institutionally according to self-imposed rules and regulations of internal conduct as aspects of "remaining a member".

That there is such broader, more comprehensive meaning intended in the simple words of Sec. 4(b) may be sensed without strain in the consistent style of the fuller context of Sec. 4. For by like simple phrasings of primitive acts of basic conduct, earlier so written in Sec. 20 of the Clayton Act, the other eight subsections of Sec. 4 have been held to insulate the various other "acts" and their later developed variations and ramifications.[12] The statutory phrasings were surely not devised as a draftsman's literal precision or as tender euphemisms, but must rather be understood as artful cullings of neutral words of ultimate behavioral significance, with maximum practicable flexibility to reach all then present and future forms and manifestations of the activity so described.

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12. Cf. *Copra v. Suro*, 236 F. 2d 107 (C.A. 1), holding as to a stated Taft-Hartley Sec. 301 cause of action between employee-beneficiaries and trustees of a jointly administered welfare trust fund (surely unheard of in 1932), that Norris-LaGuardia Sec. 4(c) "expressly" forbids an injunction to freeze the power of the trustees to collect or disburse any moneys provided for under the trust agreement and declaration, originated in 1950.

D. *Sec. 4(b) draws meaning from Sec. 2 policy of freedom of association and self-organization*

This view and appraisal of the scope of meaning of Sec. 4(b) is both limited and enriched by the scope and content of the stated policies of the Act as a whole. Those public policies, set out in Sec. 2 of the Act, are indeed posited as the touchstone of "interpretation of this Act and in determining the jurisdiction and authority of the courts * * *." For the very first time in any statute,[13] Congress herein declared, among other things, that "under prevailing economic conditions * * * it is necessary that (the individual unorganized worker) have full freedom of association, self-organization * * *, and that he shall be free from interference, restraint, or coercion of employers * * * in self-organization or in other concerted activities for the purpose of * * * mutual aid or protection * * *."

It is our contention that the thrust and sweep of the Sec. 4(b) language, probed and understood in the full context of the statute even as enacted, and as the growth and democratization of unions have given that provision not an after-acquired but a reinforced meaningfulness, were fairly calculated to reach cases of the kind now at bar. It is intimately related to and an inseparable part of the "act" of any and all employees in independently and freely asserting and enjoying identifications in union not only without employer interference but, more im-

13. Perhaps more accurately, the Railway Labor Act, 44 Stat. 577, 45 U.S.C. 151, enacted in 1926, was a precursor, but it was specifically confined to "carrier" employees and, in setting up machinery for the settlement of disputes, was designed to avoid interruption to commerce or to the operation of carriers, rather than to restrict the jurisdiction of courts in the avowed interest of freeing workers from judicial interference. Cases under that Act bring no light, by reflection, on the Sec. 4(b) question we are dealing with.

portantly to the legislators, without further judicial interference. In that view, the District Court herein was utterly without power to issue its injunction prohibiting respondent-union from processing and investigating the Kelly charge against Rowan in vindication of their respective privileges and obligations of voluntary association and of the like incidents of all their fellow-members in self-organization.

Internal self-regulation, institutionally and *inter sese*, by the members of a labor organization and enforcement of the rights and obligations of individual membership therein clear of employer interference are essentials of "full freedom of association, self-organization", etc. bespoken as Congressional policy in Sec. 2, and are significant aspects of the act of "becoming or remaining a member of any labor organization", as protected under Sec. 4(b).

Sec. 4(b) is a simply worded but basic description of an immunized "act" comprehending the full variety of internal behavior by a union and its members in free association and self-regulation. It would frustrate legislative intent and fly in the face of this Court's construction to read the language too literally and shrivel its meaning to the bare incident of formally joining a union or the passive maintenance of good standing therein. Rather, the whole gamut of rights and duties of union members as between and among themselves and in relation to their union institutionally, as governed by the "contract" inherent in its constitution and bylaws (*Ass'n. of Machinists* v. *Gonzales*, 356 U. S. 617), is embraced in the full freedom of association, self-organization * * * free from the interference * * * of employers" spelled out in Sec. 2 of the Act and infused in Sec. 4(b) as the instinctive characteristics of "becoming or remaining a member

of any labor organization", free from restriction by injunction.

In *Sperry Gyroscope*, supra, the employer in a declaratory judgment suit sought to enjoin the union from breaching an express agreement not to affiliate organically with certain other types of labor organizations unless first approved by a majority of *all* employees, not only of its own members, in the present bargaining unit represented by the union. The union was about to affiliate with an international union but would not permit non-members who were in the unit to vote on authorization. District Judge Herlands held: "Such an injunction would restrain the union membership, collectively, from freely associating itself with the international." He concluded, in denying the motion for an injunction by reason of Sees. 2 and 4(b):

> "However reasonable (the agreement) appears to be, an injunction preventing its breach would be an order of a federal court impinging upon the full freedom of association * * * by employees. That is precisely what Congress intended to prevent by the broad provisions of the Norris-LaGuardia Act.
>
> "(The agreement) may be legal and plaintiff may be entitled to such other relief (under Section 301 * * *) as the Norris-LaGuardia Act does not withdraw from the jurisdiction of the court * * *."

The protection by Sec. 4(b) from private injunction against acts which lie in the domain of "internal union affairs" and which involve a union's own prescribed rules finds its counterpart and logical extension in the protection by proviso[14] in Sec. 8(b)(1)(A) of the Taft-Hartley Act

14. *UAW Local 283, Wisconsin Motor Corp. et al*, 145 NLRB No. 109, decided January 17, 1964, holding the quoted proviso to include disciplinary fines and suspensions on union members who violated a union rule imposing production earning ceilings on piecework ers. *American Newspaper Publishers' Association* v. *NLRB*, 193 F. 2d 782 (C.A. 7), 800, 806, affirming 86 NLRB 951, 955-7.

against Labor Board "injunctions" touching such rules respecting "the acquisition or retention of membership therein". These protections do not turn necessarily on any claim of tight insularity of such matters from some practical, possibly legitimate concern of employers in collective bargaining or other labor-management relationships. *Allen-Bradley Co.* v. *NLRB*, 286 F. 2d 442 (C.A. 7).

Nor does respondent union here question the validity and enforceability, otherwise than by injunction, of Sec. 20-c of its agreement with petitioner. However, to the extent that rights and duties of respondent, as a responsible union vis-à-vis its members Kelly and Rowan, and the latter's rights and duties as its members, may seem to have been limited or contracted away in any degree in Sec. 20-c, even their alleged wrongful exercise and pursuit are, at the very least, beyond reach of the injunctive process. For if *Allen-Bradley*, supra, is right that a proposal limiting the Union's right to discipline members is a mandatory subject for bargaining relative to terms and conditions of employment, then it must be equally true that an injunction against such discipline would not only intrude into the area of and affect such terms and conditions, but curtail the union freedom of unilateral action as well, subject only to contractual remedies. *Macneish*, supra.

The constrictions of Norris-LaGuardia in delimiting the "forbidden territory" for injunctions in this area are nowhere more forcefully illustrated than in *Alcoa Steamship Co., Inc.* v. *McMahon*, 81 F. Supp. 541 (S.D.N.Y.), aff'd 173 F. 2d 567 (C.A. 2), cert. denied 338 U. S. 821. In that case, employers sought to enjoin a union and some "rebellious members" who, in defiance of the union, would not honor its contract with plaintiffs. *The union indeed did not oppose the petition for an*

injunction, among other things within Sec. 4 "restraining the union from receiving the dues of the recalcitrant members and conferring upon them any union benefits". Nonetheless the Court reluctantly held itself powerless under the Act to enjoin. In passing, District Judge Rifkind noted that "it is not yet the policy of the United States judicially to compel obedience to collective bargaining agreements on pain of imprisonment"; moreover, "* * * the courts are not suitable instruments for maintaining internal discipline inside a workshop"—or, it might have added, inside a union.

No limitations or qualifications are placed upon the absolute command in Sec. 1 of the Act that, apart from procedural conformity in other proper cases, *no* injunction shall be issued "contrary to the public policy declared in" Sec. 2. That command controls even in a case of conduct seemingly devoid of any of the particular characteristics of the snugly literal specifications on the face of Sec. 4, but yet integrally, functionally, and realistically implied in the behavior so specified and so in consonance with the policy enunciated in Sec. 2. If such broader conduct is enjoined, the courts would by so much frustrate that command and emasculate that policy.

As hereinbefore shown, the restraint upon the union deters it from exercising its constitutional duty to its members to receive, entertain, investigate, and try cognizable charges lodged by any member against another and duly authorized by its membership to be processed. Not only is it the right and privilege of a member to initiate such proceedings, but it is a liability of every other member so to be charged and subjected to the process, as it is the union's inescapable duty to serve the members in the role of providing them with prescribed measures of due process and fair vindication. The comprehensive

system detailed in the organic laws of the union (R. 27-35) is an exemplar of classical democratic procedures under the "rule of law", outstanding among trade unions.[15]

It may be remarked that as a foreman's required union membership, permissible under Sec. 14(a) of Taft-Hartley, is not to be presumed a *per se* violation of law because he has the power and opportunity to discriminate (*Teamsters Local 357* v. *NLRB*, 365 U. S. 667; *NLRB* v. *News Syndicate Co., Inc.*, 365 U. S. 695), so too it is not to be presumed that, because it has the power duly to discipline its members, the union will ultimately violate Sec. 20-c of its contract with the employer in respect of Kelly's charge against Rowan.

But if we should suppose, contrary to long experience within this local union (R. 39-40), that due proceedings *might* eventuate in union discipline of foreman Rowan in violation of Sec. 20-c, a premature, jumpy fear as to that mere possibility is not a basis for injunction in any event. It cannot conceivably be that the contractual Sec. 4's flat and unqualified requirement of foreman Rowan's union membership was so faithlessly negotiated[16] or artlessly written as to be without substantial meaning.

15. It is one of the only two unions which provide a preliminary two-step review by the total membership body before one member's charges against another may be brought to trial. This union alone further provides an intermediate review and report between those steps by a special investigating committee. *Disciplinary Powers and Procedures in Union Constitutions*, p. 48, U. S. Department of Labor Bulletin No. 1350 (May 1963).

16. If the union gained something, by way of reassurances against certain employee insecurities, in this bargained requirement of the foreman's union membership, the employer gained much too in the confidence and respect of its employees for such supervision by one from their own ranks. We can hardly believe that the employer intended to overreach the union with no more than an illusory promise of the requirement in exchange for a measure of privileged surveillance of private union matters and privileged "company domination" of the union, otherwise denied to the employer as a matter of law in placing its foreman, as such, inside the union halls with no accountability but to the employer.

E. *Sec. 4(b), so construed, is fortified by Taft-Hartley and Landrum-Griffin*

Taft-Hartley guarantees to union members the unrestricted right of association (Sec. 7) free from any employer interference [Sec. 8(a)(1)], and to the union freedom from such interference with its own administration [Sec. 8(a)(2)], including its own prescribed rules with respect to the retention of membership [Sec. 8(b)(1)(A) proviso]; and permits a foreman to become and remain a union member [Sec. 14(a)].

Landrum-Griffin (Title I, Bill of Rights) guarantees to union members equal rights and subjects them to equal liabilities in the affairs and procedures of the union, including rules as to their several responsibilities to it as such [Sec. 101(a)(2)] with safeguards against disciplinary action but by due process [Sec. 101(a)(5)], yet under requirement of exhaustion of reasonable internal remedies before resort to courts [Sec. 102], where only as a party in a member's own proper action may an employer "participate" [Sec. 101(a)(4)].

Even if we assume, *arguendo*, that the union's mere investigation of the Kelly charge is, without more, forbidden "discipline" of foreman Rowan or that it will surely eventuate in a penalty upon the latter contrary to Sec. 20-a yet such wrongful acts are not a proper subject allowed to the Court for judicial pre-testing as to the possible merits of the controversy for a precautionary injunction. It is time enough after, indeed premature until,[17] an arbitration award so finally holds and court

17. That even an arbitrator invested with ceded power to enjoin will rather exercise judicious self-restraint than so act upon an employer's contractual grievance *anticipatory* of forbidden union discipline which may be visited upon its members in future, hence "too nebulous and too speculative" for such injunctive prohibition, see *New York Twist Drill Mfg. Co.*, 39 LA 167, 168.

confirmation is obtained. Only then, if ever, may the acts be restrained or otherwise remedied by fashioned decree commanding obedience to the award.

The conduct here enjoined is completely fortified by strong considerations of expressed and positive public policy cited above from Taft-Hartley and Landrum-Griffin, and in no way conflicts with any other public policy. Injunction would be contrary to the overriding policy of employees' free association in unions of their choice with equal rights under fair and democratic procedures. The improvident effect of the instant intrusive injunction would be to cause the union to suspend the operation of its vital internal rules and regulations. This would deny their lawful protection and benefit to its members, and discriminatorily withhold the processes allowing and requiring willing members to resort to their prescribed rights and to discharge their voluntarily undertaken responsibilities toward the organization and their fellow-members similarly bound, similarly safeguarded.

Worse, the injunction, by trenching upon the union's internal affairs, indirectly becomes in effect a specific instrument for the employer's indulgence in unfair labor practices under Taft-Hartley by interference[18] with its employees and with their union administration, and for the employer's impairment of its employees' "equal rights" as union members under Landrum-Griffin. Rather, under this last Act, only in protection and vindication of such rights, and not to stifle them, is judicial intervention by injunction allowed and invited (Sec. 102), and then only at the instance of a union member [Sec. 101 (a)(4), 102]. Nowhere does the legislative history of Taft-Hartley or of Landrum-Griffin indicate a Congressional concern and

18. *NLRB* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), enforcing 88 NLRB 75, 76; *Fairfield Engineering Co.*, 74 NLRB 827.

purpose to invest employers with an effective interest superior to that of employees in union democracy, members' "bill of rights", free association, and self-organization.

Surely a charged member of the union such as foreman Rowan could not avail himself, even under the explicit guarantees and remedies of Landrum-Griffin Secs. 101 and 102, to obtain an injunction against the union's mere processing of the charge against him. Apart from the necessity of recourse first to and exhaustion of the reasonable inquiry, hearing, and decisional procedures within the union before he might be disciplined actionably at all, even the burden of his ultimate discipline might have to abide exhaustion of his further "home" remedies of appeal and review before the courts will intervene. *Edsberg* v. *Local Union No. 12*, 300 F. 2d 785 (C.A. 9); *Delahery* v. *Marine Cooks & Stewards*, 199 F. Supp. 270 (D.C. Cal.); cf. *Detroy* v. *American Guild of Variety Artists*, 286 F. 2d 75 (C.A. 2), cert. denied 366 U. S. 929. In *Edsberg* the Court said, "We find here no uncertain or futile remedy offered to appellants (union members) by their own organization. In the absence of such a factual situation, we recognize and reaffirm 'the declared policy [of the courts] favoring self-regulation by unions.' *Detroy* v. *American Guild of Variety Artists*, *supra*, at 81." Also see *Flaherty* v. *United Steelworkers* (U.S.D.C., So. Dist. Cal.) 46 LRRM 3006, 41 LC Par. 16,517, unreported officially.

Hence, since a union member himself does not have a cause of action, and there is no subject-matter for Court jurisdiction to grant injunctive relief in his favor, until a defined measure of actual discipline has been imposed on him and fair, reasonable, internal procedures have been

duly exhausted before and after that event, perforce the employer independently contracting with the union likewise against such discipline cannot be conceived sooner to acquire a parallel cause of action for such preferred relief, or the Court any jurisdiction to grant the same, than it can have accrued to the member.

Finally, if we may be allowed the rhetoric, can it be that under Sec. 4(a) the Court would be powerless (*Sinclair*) to enjoin the union from a concerted refusal to work with or in protest against some actions of foreman Rowan so long as he remained a member of the union; but that despite Sec. 4(b) the Court could enjoin its sober introspective inquiry as to whether, having "become", he should "remain" one of its members, and if so under what terms of condign discipline for his protested actions?

At the risk of having argued our Sec. 4(b) point at too great length, at apparent cross-purposes with petitioner's main point, and wide of the exact issue on which certiorari was sought and granted, we fully developed this phase of our argument as we presumed to reserve it for fundamental review, and now pass to the Sec. 7 question which, respectfully, we consider to be secondary and subordinate.

II

The injunction was subject to the jurisdictional limitations and procedural requirements of Norris-LaGuardia Section 7.

We come now to consider whether, if indeed at all "the employer is to be allowed to enjoy the benefits of an injunction along with the right which Congress gave him in Sec. 301 to sue for breach of a collective agreement" (*Sinclair*, at p. 214), he may have it in disregard of

Norris-LaGuardia Sec. 7. The Court of Appeals has said no; the District Court, to repeat, had said nothing. Petitioner says yes because Norris-LaGuardia altogether, and Sec. 7 thereof at least, are as "inapposite" as the latter was held to be in *Lincoln Mills* when only compelling arbitration.

This Court duly noted the sure practicality "that the right to sue which Sec. 301 gives employers would be worth more to them if they could also get a federal court injunction to bar a breach of their collective bargaining agreements" (*Sinclair*, p. 214). Nonetheless, it also observed there that, even without the aid of such unavailable injunction, the contractual right to arbitration is still quite unimpaired in its appropriate enforceability. Chief Judge Magruder had earlier remarked in *Local 205, U. E. v. General Electric Co.*, 233 F. 2d 85 (C.A. 1), "Continuation of the strike theoretically is not a barrier to an arbitration • • •. But the employer is not without remedies for such a continuing breach, even though the Norris-LaGuardia Act precludes the swift, effective injunctive remedy."

A. *Sec. 7 "inapposite" only when Norris-LaGuardia, in rare exceptions, entirely inapplicable*

While *Lincoln Mills* declared Sec. 7 "inapposite" and *General Electric, supra*, referred to it in a negative context as possibly a "snare and delusion, holding out the possibility of jurisdiction but demanding for its exercise sworn allegations of inapposite facts", both those cases were dealing narrowly with reasons for not inhibiting a Taft-Hartley Sec. 301 action for only a mandatory decree of specific performance of an agreement to arbitrate. Neither addressed itself to a prohibitory injunction's requirements under Sec. 7 where the acts fit specifically into the Sec. 4 or other kinds of positive conduct not to be enjoined, by fiat of Sec. 1, because they are privileged

behavior contemplated in and consistent with Sec. 2's interpretative policy statement.

Enforcement of arbitration agreements is at once, of course, a complete effectuation of Taft-Hartley Sec. 301 as an avowed extension of responsible collective bargaining; but, as to Norris-LaGuardia, it negates *no* element of the guiding "full freedom" declarations in Sec. 2, and besides is not a prohibition of any of the particularized Sec. 4 "acts" or other labor conduct protected against injunctions. In effect, though short of outright expression, this Court and others in the line of its authority seem to have said that Sec. 7 is "inapposite" to arbitration orders because, really *in its entirety*, Norris-LaGuardia has no meaningful application at all to a non-prohibitory injunction directing the doing of the defined act of arbitration. The very consummation of that act, pursuant to voluntary agreement, is itself a positive affirmation of the desired good in the public policy set out in Sec. 2. Cf. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 563.

By contrast, prohibitory injunctions reaching acts such as fall specially within Sec. 4, or which more generally constitute inherently a course of conduct otherwise characteristic of or germane to the exercises of "full freedom" in the Sec. 2 postulate, are blanketed inevitably under Norris-LaGuardia limitations at large. Hence they are appositely, indeed inextricably, subject to the jurisdictional prerequisites of Sec. 7, if somehow the several absolute withdrawals of injunctive power, by virtue of Secs. 1 and 4, are to be lifted in the abnormal cases therein provided for. The very few exceptions in this Court to that general proposition have been narrowly drawn, if not always with easy reconciliation, around compelling reasons such as clear primacy of some other statutory objective, as in the railway cases, or of the

duty of fair representation, or such as abhorrence of racial discrimination in labor relations.

These rare exceptions have been made with due re-emphasis in each instance[19] that Norris-LaGuardia as a vehicle of living public policy nonetheless survives strong. In none of those exceptional cases, moreover, has the Court *separately* lifted only the specific requirements of conformity with Sec. 7. Those demands have been dispensed with radically only as Norris-LaGuardia *as a whole* was held not to be a bar at all. In the generality of cases to which that Act has been left applicable, "the 'injunction' at which Sec. 7 was aimed", as Chief Judge Magruder put it in *General Electric*, "is the traditional 'labor injunction', typically an order which prohibits or restricts unilateral coercive conduct of either party to a labor dispute."

B. *Sec. 7 otherwise inevitable in prohibitory injunctions against Sec. 2 or Sec. 4 conduct*

We shall analyze Norris-LaGuardia Sec. 7 in terms of the type of labor dispute "case" to which its procedures are stated to be applicable. We lay aside breaches of agreement merely to arbitrate, in which inapplicability has already been decided. The introductory paragraph of Sec. 7 denies jurisdiction to enjoin "in any case * * * except" on the conditions mentioned. This Court in its various recent opinions dealing with refusals to arbitrate and with strikes in breach of contract or in violation of other laws is at times thought to have suggested, and some lower courts seem so to have understood, that Sec. 4 provides a specification of the *entire* all-inclusive panoply

19. *Order of Railroad Teleg.* v. *Chicago & NWR Co.*, 362 U. S. 330, 338-9, for discussion of and citations (ff. 14, 15) to these exceptions.

of activities as to which injunction abuses had occurred prior to 1932 and, in constant sum and distinctive variety, were to be prevented in future. By the same token, that unwitting suggestion has been thought to go further: that due injunction under Sec. 7 may be had against not only certain unlawful, violent, or fraudulent deviants of those precise Sec. 4 "acts", but against any and all *other* labor dispute conduct, even though not so tainted and clearly within the range of "full freedom" of actions under Sec. 2 broad policy.

We do not read these cases to hold, even to suggest but when torn out of context, any such sweeping proposition as to such other acts not exactly slotted into or apparently unrelated to Sec. 4. For we are confident that the Court never meant to ignore or nullify the last clause in Sec. 1: "nor shall any such * * * injunction be issued contrary to the public policy declared in this Act," immediately following in Sec. 2. That quoted clause clearly comprehended not only specific "acts" described in Sec. 4 which, of course, were more generally covered as well by Sec. 1, but any and all other kinds of conduct unmentioned in Sec. 4 yet described as within the "necessary * * * freedom" of actions in Sec. 2. That policy statement, be it remembered, was written not only as a charter of substantive rights or privileges but, on its face, as the express, binding standard of "interpretation of this Act and in determining the jurisdiction and authority of the courts * * *."

That is to say, for a single example, that the employee act of "*designation* of representatives of his own choosing" (Sec. 2), even *without* "becoming or remaining a member of any labor organization" (Sec. 4), cannot be enjoined without running "contrary to the public policy declared in this Act" (Sec. 1), and is therefore immune to any such

restraint. If somehow that or some other such illustrative act, only to be identified with Sec. 2, were tainted with violence or fraud or other such illegality, then as with Sec. 4 acts so tainted, it would be enjoinable subject nevertheless to Sec. 7. That, we maintain, is the natural, intended, and inescapable scope and meaning of the last clause of Sec. 1 and of "any case" in Sec. 7. *Milk Wagon Drivers etc.* v. *Lake Valley Farm Products etc.*, 311 U. S. 91, 101.

It is true that in *Lincoln Mills* (at p. 458) this Court had said and has since repeated, in differentiating a mandatory injunction to arbitrate from other traditional labor injunctions, that the Sec. 4 listings were the "kinds of acts *which had given rise* to abuse of the power to enjoin" (emphasis supplied). That observation was undoubtedly valid history. But in *Sinclair* (at p. 212), inadvertently we are sure, this Court may have seemed to enlarge upon that observation by a loose paraphrase: "kinds of conduct which the specific prohibitions of the Norris-LaGuardia Act withdrew from the injunctive powers of the United States courts", citing (f. 33 thereto) to *Lincoln Mills* "and other cases not involving an injunction against activity protected by Sec. 4 * * *." The restricted reference to Sec. 4 cases of curtailed injunctive power might seem to suggest more than the historical fact that, in genesis, they "had given rise" to abuse of power; and rather that they were indeed exclusively the full range and sum total of acts now protected by the Act at large, in face of the array of Secs. 1, 2 and 3 along with Sec. 4.

But surely the Court could have meant no such relaxation of the Act's aversion to labor injunctions in general, for even in *Lincoln Mills*, immediately after the historical recitation as to how judicial abuses had arisen in such matters as listed in Sec. 4, the Court in the very next

sentence (p. 458) went on to add: "The failure to arbitrate was not a part and parcel of the abuses against which *the Act* was aimed" (emphasis supplied). And indeed in *Sinclair* too, at p. 203, in referring to the repealer argument, this Court stated the contention to be that the Act "no longer prohibits *even the injunctions specifically described in Sec. 4* * * *." This clearly implies that the Act also and more broadly prohibited some other injunctions as well. The test, then, which this Court would set is obviously whether the "acts" sought to be enjoined are protected, not by Sec. 4 alone, but by *any* command of the Act as a whole.

Upon this view of the law, we consider unsound the relevant Norris-LaGuardia analysis and ruling in *Parks* v. *IBEW*, 314 F. 2d 886 (C.A. 4), cert. denied 372 U. S. 976, cited and discussed in petitioner's Brief, p. 11, to the extent that, rather tentatively at least because a mandatory rather than a prohibitory injunction was involved, it concluded more importantly, on the misread or misconstrued authority of *Lincoln Mills*, that unless a Sec. 4 type of "abuse" was present in the case the Act did not operate to limit injunctive power at all.

C. *Sec. 7 correctly applied by Court of Appeals to bar injunction against Sec. 2 conduct*

To the contrary and insofar as there is an arguable conflict, although Judge Hays did not spell out the details in his opinion for the Court below, we submit that the Court of Appeals decision in our case now under review represents the sounder authority. Judge Hays, without express reference to the enjoined conduct's place under Secs. 1 and 2, wrote that, in the generality of labor disputes, "Section 7 of the Act covers activities which are not covered by Section 4 * * * without regard to the nature of

the activities * * *" (R. 52-3). Impliedly, of course, he nevertheless must have meant activities generically fitting within the Sec. 2 charter of "full freedom" of actions.

It was held in *Green* v. *Obergfell*, 121 F. 2d 46 (CA DC), cert. denied 314 U. S. 637, that self-determination of internally disputed union affairs, solely concerning "jurisdiction" as among the litigating labor organizations, was an exercise of the "full freedom of association, self-organization and designation of representatives". As such, that activity was held, on extended analysis of "recognized principles" and the facts of the case, to afford "no foundation for equitable relief, or reason for judicial interference" in the "intra-association affairs" of the parties. More pointedly here, it held that this conduct was immune to prohibitory injunction, by force of Norris-LaGuardia Sec. 1 and without reference to Sec. 4 at all: hence that, if enmeshed with such unlawful acts as might restore to the Court the jurisdiction otherwise withdrawn, yet strict conformity with every last requirement of Sec. 7 was an express, inescapable, non-waivable condition precedent to the power to enjoin.

Lauf v. *E. G. Shinner & Co.*, 303 U. S. 323, was this Court's early leading case on the absolute necessity of exact compliance with each and every requirement under Sec. 7 as to procedures and complete findings concerning the nature of the case and the unlawful acts, specified equitable grounds for relief, and the complainant's helplessness to secure legal protection of physical property. No combination of these elements short of their totality was suggested as substantial or adequate compliance to satisfy the flat statutory conditions of jurisdiction. That the case, on its peculiar facts, may have involved an act specified in Sec. 4 of Norris-LaGuardia is beside the point. The lesson is rather that no prohibitory injunction what-

ever may be issued in a labor dispute to restrain acts unless the case is of a kind wherein each of the stated factual and equitable conditions is fully present and satisfactorily met in advance. This was unqualifiedly reaffirmed by the Court in *Sinclair* at p. 202, by citation in f. 13. *Wilson & Co.* v. *Birl*, 105 F. 2d 948 (C.A. 3).

Furthermore, in *Grace Co.* v. *Williams*, 96 F. 2d 478 (C.A. 8), it was even more severely held, on authority of *Lauf* and on the explicit wording of Sec. 7, that where the complaint itself failed affirmatively to allege under oath the exactly fitting fact situation and precise compliance with and satisfaction of each and every one of the conditions, such fatal defect could not be cured even by findings of fact supported by evidence meeting the essentials not so pleaded. Our instant case is more incurably lacking for neither the allegations of the complaint, nor evidence, nor findings are present which purport to satisfy the test.

What is more, as Judge Hays observed below, not only were the Sec. 7 requirements not met, "but it would clearly be impossible for the court to make the required findings". The impossibility so referred to must have been in terms of "threatened unlawful acts", under subsection (a) thereof, and of "police protection of property", under subsection (e). As for subsections (b), (c), and (d) of Sec. 7, all that need be remarked is that the record was barren of any evidence of the slightest value, even by affidavit, on which to bottom any such conventional findings in equity.

D. *Sec. 7 so applied not inconsistent with ordered arbitration*

Of course, by requiring Sec. 7 to be met "in *any* case" and thereby perhaps, as held in our instant case, precluding injunctive relief, the Court doubtless renders the suitor therefor as unrequited and unhappy as though

his complaint were held to fall hopelessly under Sec. 4 itself. Besides, the one reason rather than the other for denying that relief, especially when sought to be coupled with an arbitration order, has no different redemption value in the limited expectancies of the scheme of arbitration at its *optimum* achievement in substituting for and thus avoiding trial by combat.

But that optimum is no more indispensable as an element or a measure of the success of arbitration than it is *sine qua non* of the success of collective bargaining itself. At best, those processes and their encouragement and enforcement are conceived to create an atmosphere conducive to, and thereby to *tend* in the direction of, peaceful solution of disputes free of direct action sometimes involving untoward brute pressures, and thus hopefully to minimize their frequency, duration, and intensity of impact. Those striving processes are not realistically in experience, or by design and express provision of the relevant statutes, so exclusive, compulsory, and repressive as to foreclose, as between the private parties, any occasional parallel resort to the direct pressures and actions customary to industrial disputes and otherwise quite lawful in nature. *The Public Interest in National Labor Policy* (C.E.D. 1961), page 90.

As Taft-Hartley undertakes no more than to bring the parties to the conference room door and to see them enter to bargain per NLRB sanction or to arbitrate per the Court's, so it leaves them normally to their own private devices within civilized limits, at least as between themselves, as to how they shall behave inside and outside that room in affecting or accomplishing their ultimately acceptable solutions. As "there is simply no inconsistency between the application of economic pressure and good-faith bargaining" (*NLRB* v. *Insurance Agents' Inter-*

national Union, 361 U. S. 477, 494-5), so there is none between such pressure and good-faith arbitration.

So too, as petitioner fears, a Court's failure or lack of power to enjoin certain labor activities may adventitiously at times somehow embarass or even in some measure frustrate full attainment of one or more of all ultimate objects variously desired to be had by way of arbitration. But that is equally true and no more or less significant, in law or in aspiration, for the prospectus of basic collective bargaining and even of faithful contract performance. As to those normal stabilizers in the conduct of labor relations, we have now come to accept the established fact that, in the main, concomitant pressures and breaches, however unstabilizing, are nonetheless non-enjoinable in private litigation in the federal courts.

In any of these respective situations the sense of that embarrassment and frustration is not always or wholly without its own possible constructiveness, even if only by indirection, in the aching business of labor relations. Sometimes, though of small comfort to one of the disputants, that sense may serve usefully at least as valid reason for mutual expedition of the otherwise dragging process of argumentative and deliberative settlement of differences, not a small achievement in itself. In all events, to make no more of such an *apologia*, it is a far cry from petitioner's notion that the process (here left dormant by petitioner itself) is thereby rendered utterly meaningless and ineffectual for its proper purposes, as though the whole structure of labor law and order had collapsed because Courts, by choice of Congress, are deprived of power to fashion and control every last form of behavior possibly touching such processes.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the order of the District Court staying and prohibiting respondent-union's internal activities upon the Kelly-Rowan charge, should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX:

Statutory Provisions Cited in Respondent's Brief

NORRIS-LAGUARDIA ANTI-INJUNCTION ACT

(47 Stat. 70, 29 USC 101)

"*Section 1.* That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 2. In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are herein defined and limited, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to

negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted.

Section 3. Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 2 of this Act, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral; express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or re-

mains a member of any labor organization or of any employer organization.

Section 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

• • • • •

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

• • • • •

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

• • • • •

Section 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public

officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property • • •

• • • • •

Section 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

• • • • •

Section 13. When used in this act and for the purposes of this act—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; • • • (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter

defined) of "persons participating or interested" therein (as hereinafter defined).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

("Taft-Hartley"—61 Stat. 136, 29 USC 141)

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Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Section 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to * * * interfere with the * * * administration of any labor organization * * *

* * * * *

Section 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

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Section 14(a). Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 ("Landrum-Griffin"—73 Stat. 522, 29 USC 411)

Section 101(a)(1). Equal Rights. Every member of a labor organization shall have equal rights and privileges within such organization * * * to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

Section 101(a)(2). Freedom of Speech and Assembly. Every member of any labor organization shall have the

right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, * * * or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

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Section 101(a)(4). Protection of the Right to Sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, * * *: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, that no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

Section 101(a)(5). Safeguards Against Improper Disciplinary Action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reason-

able time to prepare his defense; (C) afforded a full and fair hearing.

Section 101(b). Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

UNITED STATES ARBITRATION ACT

(61 Stat. 669, 9 USC 1)

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Section 3. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.